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THE INDIAN  
LIMITATION ACT, 1877,

AS

AMENDED BY SUBSEQUENT ACTS

OF THE

LEGISLATIVE COUNCIL OF INDIA :

WITH

COMMENTARIES, AND NOTES OF CASES DECIDED  
THEREON,

(INCLUDING CASES DECIDED IN THE CHIEF COURT, PANJAB).

BY

o M. H. STARLING, B.A., LL.B.,

BARRISTER-AT-LAW, AND CLERK OF THE CROWN, HIGH COURT, BOMBAY.

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# INDIAN LIMITATION ACT.

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ACT No. XV OF 1877,

*As amended by Acts Nos. XII of 1879, VIII of 1880,  
V of 1881, IX of 1887, VII of 1888, XII  
of 1891, and VI of 1892.*

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

**An Act for the Limitation of Suits, and for  
other purposes.**

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Whereas it is expedient to amend the law relating to the limitation of suits, appeals, and certain applications to Courts; and whereas it is also expedient to provide rules for acquiring by possession the ownership of easements and other property; It is hereby enacted as follows:—

## PART I.

### PRELIMINARY.

**Sect. 1. Short title. Extent of Act. Commencement.—This Act may be called “The Indian Limitation Act, 1877.”**

It extends to the whole of British India; but nothing contained in Sections 2 and 3, or in Parts II and III applies—

- (a) to suits under the Indian Divorce Act, or
  - (b) to suits under Madras Regulation VI of 1831;
- and it shall come into force on the first day of October 1877.

*Notes.*

By Act I of 1868, Sect. 2, Cl. 8, "British India" means the territories for the time being vested in Her Majesty by the Statute 21 and 22 Vict. c. 106, other than the Settlement of Prince of Wales' Island, Singapore, and Malacca. By that statute the territories to which it applied were defined to be all territories then in the possession or under the Government of the East India Company and all territories which may become vested in Her Majesty by virtue of any rights vested in, or which might, but for the passing of that Act, have been exercised by the said Company in relation to any territories.

Acts of limitation, like other laws relating to procedure, apply immediately to all steps taken *after* they have come into force, except when some provision is made to the contrary; *Gurupadapa v. Virbhadrappa*, *I. L. R.* 7 Bom. 459, at p. 462. Consequently, this Act governs all suits, appeals, and applications made on and after the 1st October, 1877. There is no saving clause in it as in Act IX of 1871 of suits instituted before any specified date; *Becharam Dutta v. Abdul Wahed*, *I. L. R.* 11 Calc. at p. 58.

**Sect. 2.** *Repeal of Acts. References to Act IX of 1871. Saving of titles already acquired. Saving of Act IX of 1872, Sect. 25. Suits for which period prescribed by this Act is shorter than that prescribed by Act IX of 1871.—On and from that day the Acts mentioned in the first schedule hereto annexed shall be repealed to the extent therein specified.*

**But All references to the Indian Limitation Act, 1871, shall be read as if made to this Act; and nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act or under any enactment thereby repealed and nothing herein contained shall be deemed to affect the Indian Contract Act, Section 25.**

*Notwithstanding anything herein contained, any suit mentioned in No. 146 of the second schedule hereto annexed may be brought within five years next after the said first day of October, 1877, unless where the period prescribed for such suit by the said Indian*

*Limitation Act, 1871, shall have expired before the completion of the said five years; and any other suit for which the period of limitation prescribed by this Act is shorter than the period of limitation prescribed by the said Indian Limitation Act, 1871, may be brought within two years next after the said first day of October, 1877, unless where the period prescribed for such suit by the same Act shall have expired before the completion of the said two years.*

*Notes.*

The portions of this section which are printed in italics were repealed by Act XII of 1891.

The repeal of Act IX of 1871 by the first clause of this section does not affect any proceedings already commenced at the time the Act came into force; Act I of 1868, Sect. 6.

The second and third clauses of this section are new, not having appeared in Sect. 2 of Act IX of 1871. The first section of that Act provided that the provisions regarding limitation contained in Parts II and III should not come into force until the 1st April, 1873, and under that many decisions have been passed in respect of cases in which the limitation under that Act differed from the limitation under Act XIV of 1859, but none of those decisions affect the interpretation of the present section, because it distinctly provides that from the 1st October, 1877, nothing in Act IX of 1871 shall affect any title acquired, or revive any right to sue barred under any earlier Act, and that nothing in the present Act shall affect any title acquired, or revive any right to sue barred, under that or any earlier Act; consequently, when once a title has been acquired, or a right to sue has become barred under any earlier Act, no change of the law of limitation by the present Act, or by that of 1871, can weaken the title so acquired or revive the right to sue which had become barred. Consequently, if it be shewn that under the terms of Act XIV of 1859, a suit was barred before the 1st July, 1871, the later Acts need not be referred to, as, if they altered the law, they would not revive the right of suit; *Appasami v. Subramanya*, 15 I. A. at p. 169; and *I. L. R. 12 Mad. 26*; followed in *Mohesh Narain v. Tarakh Nath*; 20 Ind. App. 30; and *I. L. R. 20 Calc. 487*; in a case where Act IX of 1871 and Act XV of 1877 are supposed to be contradictory.



*Title.*—The term “title” applies to property, not to a right to sue; a right at a particular time to sue for a claim in a particular manner within a particular period is not a title acquired at that time. Thus, accounts were stated in December, 1874, but not signed. At that time Act IX of 1871 was in force which did not require accounts stated to be in writing and signed by the party chargeable. When the suit was brought, the claim upon some of the items of the account was barred under this Act, and the statement of accounts did not fall under Art. 64 of this Act, because it was not signed. It was held that the right to sue within three years from the date of the unsigned statement of accounts under Act IX of 1871 was not a title acquired under that Act within the meaning of this section; *Thakurya v. Sheo Singh*, I. L. R. 2 All. 872; *Zulfikar Husain v. Munna Lall*, I. L. R. 3 All. 148.

*Right to sue.*—The words “right to sue” should be used in their widest signification, so as to include any application invoking the aid of a Court in a suit for the purpose of satisfying a demand, such as “suing out execution;” *Nursing v. Hurryhur*, I. L. R. 5 Calc. 897; following *Shumboonath v. Guruchurn*, *ib.* 894, wherein it was held that this Act cannot be applied to *anything* which, at the time of its becoming law, was barred by the law of limitation which it replaced, unless it can be shewn that such was the express intention of the Legislature; see also *Manjenath v. Venkatesh*, I. L. R. 6 Bomb. at p. 61; and *Jugmohun v. Luckmeshur*, I. L. R. 10 Calc. 784, where the two Calcutta cases cited are approved of; also *Baness v. Turton*, *Panj. Rec.* No. 23 of 1883; and *Fatteh Muhammad v. Lalji Mal*, *ib.* No. 143 of 1883; in which the same result is arrived at by a different course of reasoning.

A mortgage was executed in 1797 and an acknowledgment of the existence of the mortgage signed in 1827, but by an agent only, which acknowledgment it was held was not, at the time, sufficient to start a new period of limitation. A suit for redemption would, therefore, have been barred before Act IX of 1871 came into operation. Under Act IX of 1871 that acknowledgment might have given the mortgagor a new starting-point from which he might redeem, but he did not bring his suit until after the Act was in force, and Act IX of 1871 rendered the suit barred.

was held that at the time when this Act came into force the right to redeem was barred, and the present section prevented the claim reviving; *Dharma v. Govind*, *I. L. R.* 8 *Bomb.* 99 at p. 102. The case would have been different under Act IX of 1871; see *Mohesh v. Busunt*, *I. L. R.* 6 *Cal.* 340; but this proposition is doubted in *Abdul Karim v. Manji Hansraj*, *I. L. R.* 1 *Bomb.* 295.

*Extension of Time.*—The third clause of this section prevents injustice being done by a term of limitation being suddenly introduced by this Act shorter than that provided by the Act of 1871 in respect of claims in existence at the time of the passing of the Act, or which might be almost expiring; see the remarks in *Khushalbhai v. Kabhai*, *I. L. R.* 6 *Bomb.* at p. 29; but the extension of time is only allowed when the term under the old Act would have allowed the plaintiff to wait till after the termination of the extension, and if the old term of limitation expires within the period of grace then the suit must be brought before the old term expires. Under the Act of 1871, the limitation in respect of certain claims payable on demand could be regulated by the plaintiff, because the time ran from the date of demand; consequently, as the present Act makes the limitation run from the date of the transaction, the time of limitation is shortened and this clause of this section applies; *Sukur v. Kasam Jan*, *P. J.* 1879, p. 575; *Appasami v. Aghilanda*, *I. L. R.* 2 *Mad.* 113; *Sabapati v. Chedumbara*, *ib.* 397; *Bandi v. Madalapalli*, *I. L. R.* 3 *Mad.* 96; *Rup Keshore v. Mohini*, *I. L. R.* 3 *All.* 415; *Ichhashankar v. Killa*, *I. L. R.* 4 *Bomb.* 87; *Rughoonath v. Narotum*, *P. J.* 1881, p. 122; *Omirtto v. Howell*, 2 *C. L. R.* 426; *The Administrator-General of Bengal v. Kedurnath*, 4 *C. L. R.* 102. So, too, under Arts. 133 and 134 of the Act of 1871, which applied to purchases “in good faith” from a trustee, depository, pawnee, or mortgagee, were modified in the Act of 1877 by leaving out the words “in good faith,” and made applicable to all such purchases for a valuable consideration, it was held that a suit, otherwise barred, to recover land purchased *not in good faith* might be brought within two years from the 1st October, 1877; *Baiva Khan v. Bhiku Sazba*, *I. L. R.* 9 *Bomb.* 475.

The limitation provided for the enforcement of a right to share in family property is shorter under this Act than under that of 1871, consequently this section applies ; *Narain v. Lokinath*, I. L. R. 7 Calc. 461.

A suit by a judgment-creditor to set aside an order allowing a claim made in execution comes under this section ; *Roy Chunder v. Modhoosoodun*, I. L. R. 8 Calc. 395 ; see also *Joyram v. Pani Ram*, 8 C. L. R. 54, which was a case of a suit by a claimant whose objection had been disallowed in execution.

In cases where the effect of the provision in this section prohibiting the revivor of suits operates to shorten the period of limitation by extinguishing the remainder of the period provided under Act IX of 1871 in respect of a cause of action barred before the passing of that Act but revived by its provisions, the plaintiff will still have two years from the 1st October, 1877, within which to bring his suit ; *Secretary of State v. Vira Rayan*, I. L. R. 9 Mad. at p. 186.

**Sect. 3. Interpretation clause.—In this Act, unless there be something repugnant in the subject or context—**

*Plaintiff* includes also any person from or through whom a plaintiff derives his right to sue ; *applicant* includes also any person from or through whom an applicant derives his right to apply ; and *defendant* includes also any person from or through whom a defendant derives his liability to be sued :

*Easement* includes also a right, not arising from contract, by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another :

*Bill of exchange* includes also a hundi and a cheque :

*Bond* includes any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed as the case may be :

*Promissory note* means any instrument whereby the maker engages absolutely to pay a specified sum of money to another at a time therein limited, or on demand, or at sight :

*Trustee* does not include a benamidar, mortgagee remaining in possession after the mortgage has been satisfied, or a wrong-doer in possession without title :

*Suit* does not include an appeal or an application :

*Registered* means duly registered in British India under the law for the registration of documents in force at the time and place of executing the document, or signing the decree or order referred to in the context :

*Foreign country* means any country other than British India :

and nothing shall be deemed to be done in *good faith* which is not done with due care and attention.

*Notes.*

*Defendant.*—Where a junior widow adopted the plaintiff against the wish of the senior widow, who, thereafter, remained in possession of property adversely to the plaintiff, and subsequently adopted the defendant, it was held that the defendant was entitled to add the adverse possession of the senior widow to his own, so as to claim a title by limitation; *Padajirav v. Ramrav*, I. L. R. 13 Bomb. 164.

*Purchaser at auction sale.*—A person who purchases land at an auction sale in execution of a decree, when sued by a third party for possession, can add the time the judgment-debtor was in possession to that during which he has been in possession in calculating the time possession has been adverse to the plaintiff; *Visvanath v. Subraya*, I. L. R. 15 Bomb. 293; *Ali Saheb v. Kaji Ahmad*, I. L. R. 16 Bomb. 197; so too where the plaintiff purchased land at an auction sale in execution of a decree, and the judgment-debtor remained in possession, and sold the land to the defendant who went into possession, the defendant is entitled to add the time the judgment-debtor was in adverse possession to

the time he was in possession; *Namdew v. Gomaji*, *I. L. R.* 18 *Bomb.* 37.

*Easement*.—The definition of “*easement*” is not a full and exhaustive one. The word is to be interpreted in its ordinary sense, and then the above definition provides that it shall also include the right mentioned above. This definition, so far as regards the Presidency of Madras, the Central Provinces, and Coorg, has been repealed by Act V of 1882, Sect. 3; and as regards the Presidency of Bombay, the North-West Provinces and Oudh, by Act VIII of 1891. In those districts “*easement*” is defined by Sects. 4 to 7 of the former Act.

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## PART II.

## LIMITATION OF SUITS, APPEALS AND APPLICATIONS.

**Sect. 4.** *Dismissal of suits, &c., instituted, &c., after period of limitation.*—Subject to the provisions contained in Sects. 5 to 25 (inclusive), every suit instituted, appeal presented, and application made after the period of limitation prescribed therefor by the second schedule hereto annexed, shall be dismissed, although limitation has not been set up as a defence.

*Explanation.*—A suit is instituted, in ordinary cases, when the plaint is presented to the proper officer; in the case of a pauper, when his application for leave to sue as pauper is filed; and in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator.

*Illustrations.*

- (a) A suit is instituted after the prescribed period of limitation. Limitation is not set up as a defence and judgment is given for the plaintiff. The defendant appeals. The appellate Court must dismiss the suit.
- (b) An appeal presented after the prescribed period is admitted and registered. The appeal shall, nevertheless, be dismissed.

*Notes.*

This section is the same as the corresponding section of Act IX of 1871; and the former Act altered the law from what it was under Act XIV of 1859. Under that Act, the law was practically the same as in England, that a party wishing to avail himself of the defence of limitation must plead it, that the Court would not take notice of a defence which was not pleaded at

some time or other, and that he would not be allowed to plead it if the case was tried on its merits and decided against him, and then at a late stage in appeal the plea of limitation was set up; *Moru v. Gopal*, *I. L. R. 2 Bomb.* 120. In this case, however, *Westropp*, C. J., in delivering the judgment of the Court expressly confines the judgment to what should be done under Act XIV of 1859, and intimates that such might not be the case under Act IX of 1871, Sect. 4; *ib.* 131. As the present section definitively settles the duties of the Court with regard to the plea of limitation, the cases decided under Act XIV of 1859 will not be cited here, especially as the matter was thoroughly discussed in the case in *I. L. R. 2 Bomb.* just referred to.

This section does not apply to modes of enforcing rights other than suits, applications provided for in the second schedule to this Act, and appeals; *Abba Haji v. Abba Thara*, *I. L. R. 1 Bomb.* 253. Where a person owes money to an estate, and is therefore bound to increase the general mass thereof by a contribution of his own, he cannot claim an aliquot part of that mass without first making the contribution which completed it; consequently, where debts which are barred are owed to the estate of a testator by his sons to whom he bequeathed the residue absolutely, these must bring the amount of their debts into account before receiving the amount of their respective shares. The contribution is paid by withholding part of the mass which, if the mass were first completed, would be received back again; *Akerman v. Akerman* (1891), 3 *Ch.* 212; following the principle of *Cherry v. Boulton*, 4 *My. & Cr.* 444; and *Courtenay v. Williams*, 15 *L. J. N. S. Ch.* 204. The following case, however, decided in England, deserves attention on this point. Section 72 of the Bankruptcy Act, 1869, provides that, subject to the provisions of the Act (which, however, have no reference to limitation), any Court having jurisdiction in Bankruptcy has full power to decide all questions which may arise in any case of bankruptcy; and under that section an order was made against a former solicitor of a liquidating debtor to pay over to the trustee a sum of money which he had received on account of the debtor more than six years before the notice of motion. On appeal, it was argued that a motion under Sect. 72 was only

a substitute for an action, and that, therefore, limitation was a bar, a proposition which the Appeal Court upheld; *In re Mansel*, W. N. 1892, p. 32.

This section compels the Court hearing a suit to dismiss it if the claim be barred, although the defence of limitation has not been set up. It also compels an Appeal Court to dismiss an appeal if presented after the time allowed for appealing has expired, although the respondent has not taken the objection, and it lies upon the appellant, if necessary, to shew affirmatively that the appeal has been presented in the proper time; *Ramey v. Broughton*, I. L. R. 10 Calc. 658. The section also requires the Court hearing an application to see that the application is not barred. In carrying out the provisions of this section, the Court is bound of its own motion to look into the question of limitation, and see whether the suit, *primâ facie*, has been brought in time; and whenever the question of limitation is raised, whether by the Court or the defendant, it is for the plaintiff to shew *primâ facie* that the cause of action upon which he is suing is not barred by limitation, but that it occurred within the period applicable to the suit; *Wilby v. Henman*, 2 Cr. and M. 658; *Pandurang v. Balkrishna*, 6 Bomb. H. C. Rep. A. C. J. 121; *Mahommed Ibrahim v. Morrison*, I. L. R. 5 Calc. 37. If the plaintiff's claim is apparently barred, but he alleges some exemption, or allowance of time, he must prove the exemption or allowance. If, on the other hand, the plaintiff has shewn that, *primâ facie*, his suit is in time, but the defendant alleges that some shorter period of limitation is applicable, it then lies on him to prove such facts as will shorten the period; *Mohansing v. Conder*, I. L. R. 7 Bomb. 478.

In applying this section, it must be remembered, that statutes which encroach upon the rights of the subject, whether as regards person or property, must be construed strictly, and their words not put into operation unless they accurately fit the case in point; among such statutes are Acts for the limitation of the time within which suits may be brought. There may not necessarily be any moral wrong in setting up the defence of the lapse of time, but it is the creature of positive law, and is not to be extended to cases which are not strictly within the enactment; while provisions



which give exceptions to the operations of such enactments are to be construed liberally ; see the judgment of *Cranworth*, L. C., in *Roddam v. Morly*, 1 *De G. and J.* 1. See, also, *Umia Shankar v. Chhotalal*, I. L. R. 1 *Bomb.* 19; *New Fleming Sp. & W. Co. v. Kessowji Naik*, I. L. R. 9 *Bomb.* p. 403; *Lallubhai v. Naran*, I. L. R. 6 *Bomb.* p. 724; *Manekji v. Rustomji*, I. L. R. 14 *Bomb.* p. 272.

*Duties of Appeal Court.*—This section does not require an Appeal Court hearing an appeal, of its own motion, to ascertain that the *original suit* was filed in time; nor a Court entertaining an application to ascertain that all *prior* applications, previously adjudicated on, were made in time. Where a barred claim or application has been adjudicated upon by a Court in favour of the plaintiff or applicant such adjudication constitutes a valid decree or order, if the defendant or opposite party does not appeal and get it reversed; *Mungul v. Griji Kant*, 8 *I. A.* at p. 132; *Manjunath v. Venkatesh*, I. L. R. 6 *Bomb.* 54; *Mahomed Hosein v. Purundhur*, I. L. R. 11 *Calc.* 287; *Gangathara v. Rathabai*, I. L. R. 6 *Mad.* 237; *Nanda Rai v. Rughonandan*, I. L. R. 7 *All.* 232. If the Appeal Court is asked to notice the point of limitation, that point must be properly brought before the Court, as nothing in the merits of the case is before the Court except what is brought before it by the memorandum of appeal. Thus, where the appeal is only on some other detail decided by the lower Court, the Appeal Court will not go into limitation; the appeal must be on that point specially or on the whole case generally; *Alimunissa v. Syed Hosein*, 6 *C. L. R.* 269; followed in *Rughunath v. Pareshram*, I. L. R. 9 *Calc.* 635, where the point of limitation had been decided against the judgment-debtor, and another point against the judgment-creditor. The judgment-creditor appealed, but the judgment-debtor did not, and the Appeal Court refused to go into the question of limitation; followed in *Shirekalli v. Samia*, *P. J.* 1892, p. 87. So, too, where, in an appeal in which the point of limitation was not taken, the appellant got a remand to try a particular point, he was not allowed on a second appeal to raise the question of limitation, as by his prior acts he must be taken to have abandoned it; *Dattu v. Kasai*, I. L. R. 8 *Bomb.* 535.

Where an appeal was heard and determined without any question being raised as to whether it had been filed in time; and on a second appeal the point was not raised until the appeal came on for hearing; it was held that the appellant was not entitled to urge that question at that stage of the proceedings; *Ahmed Ali v. Waris Husain*, *I. L. R.* 15 *All.* 123. Where however, a claim is clearly barred on the face of the plaint, and that fact is first noticed by the Judge in appeal, he is not only authorized, but bound, to take notice of the bar, and dismiss the suit; *Bala Baparav v. Narayan*, *P. J.* 1874, p. 132; but *quære*, how far this ruling can stand in the face of those previously cited; see also the notes to Art. 179 under the heading "according to law."

Where one Court makes an order for execution of a decree and transmits it to another Court for execution, the Court executing the decree has no power to enquire whether the decree is barred or not; *Husein Ahmad v. Saju Mahammad*, *I. L. R.* 14 *Bomb.* 28; *secus* where a Court simply transmits a decree accompanied by a certificate of non-satisfaction; *Nursing Doyal v. Hurryhur*, *I. L. R.* 5 *Calc.* p. 901; following *Leake v. Daniel*, 10 *W. R. F. B.* 10.

*Subject to the provisions.*—The words "subject to the provisions" mean subject to such of the provisions contained in Sections 5 to 25 as are applicable and pertinent to the particular suit, appeal, or application, as the case may be; *Jawahir Lall v. Narain Das*, *I. L. R.* 1 *All.* 644.

This section would seem to apply only to suits, &c., provided for by the second schedule, because it requires the Court to dismiss any suit, &c., filed, &c., after the time limited in that schedule; *In re Kittu*, *I. L. R.* 11 *Mad.* 332; and Sect. 6 exempts from the operation of the schedule periods of limitation provided by a special or local law, and also it would seem excludes them by inference from the operation of this section, because it refers only to suits, &c., provided for by the second schedule. Consequently, whether a Court is bound to take notice of any other periods of limitation when not pleaded must depend upon the Act which provides such periods. A claim to recover an ad-

vance from a labourer under Act XIII of 1859 is not governed by this section or any part of this Act; *In re Kittu, ubi sup.*; see also *Abba Ishmail v. Abba Thara*, *I. L. R.* 1 *Bomb.* 253.

*Laches*.—Mere laches in bringing a suit within the period of limitation allowed cannot bar a claim; *Archbold v. Scully*, 9 *H. L. Ca.* 360, especially at p. 333; *Peddammuthulaty v. Timma*, 2 *Mad. H. C. Rep.* 270; *Juggernath v. Mahomed*, 2 *I. A.* 49; 14 *B. L. R.* 386; 23 *W. R.* 99; *Jamnadas v. Atmaram*, *I. L. R.* 2 *Bomb.* at p. 138; *Uda v. Imam-ud-din*, *I. L. R.* 1 *All.* 82; but it may be a ground, in certain cases, for refusing a particular form of relief, *e.g.*, specific performance of a contract; *Mukond v. Chotay*, *I. L. R.* 10 *Calc.* at pp. 1068, 1070; or a fact from which it may be inferred that the right claimed is non-existent; *Amesroonissa v. Ashruff-oominissa*, 17 *W. R.* 259 (*P. O.*); *Sham Chand v. Kishen*, 18 *W. R.* 4 (*P. C.*).

*Date of institution*.—The provision that, in the case of a pauper, a suit is instituted when the application to sue *in formâ pauperis* is presented applies to cases where the leave is granted and the application is registered as a suit; but not to a case where the applicant, after a long delay subsequently to the filing of her application, merely presented another petition which she prayed might be joined to her prior application and the whole filed as an ordinary suit; *Chunder Mohun v. Bhubon Mohini*, *I. L. R.* 2 *Calc.* 389; nor to a case where the application to sue as a pauper has actually been rejected by the Judge; *Ram Sahai v. Maniram*, *I. L. R.* 5 *Calc.* 807; nor to the case of an application for leave to appeal as a pauper which has been refused, even though the appellant may actually, but at a later period, stamp the memorandum of appeal presented with the petition; *Bishnath v. Jagarnath*, *I. L. R.* 13 *All.* 305; but if, before rejection, the applicant is ready and willing to stamp her application as an ordinary suit, and offers so to do, the date of the institution of such suit will be the day on which the application to sue as a pauper was first presented; *Skinner v. Orde*, 6 *I. A.* 126; *S. C. I. L. R.* 2 *All.* 241; *Hurri Mohun v. Naimuddin*, *I. L. R.* 20 *Calc.* 41.

*The date of the institution* of a suit is the date on which the plaint is presented, and not that on which the requisite stamp

fees are affixed so as to enable the Judge to admit it as a plaint; *Moti Sahu v. Chhattri*, I. L. R. 19 Calc. 780; dissenting from *Balkaran v. Govind Nath*, I. L. R. 12 All. 129 (F. B.); see also *Jhanda v. Bahadar Ali*, Panj. Rec. No. 3 of 1893; which, however seems to conflict with *Partab Singh v. Kishan Dayal*, ib. No. 130 of 1890. The High Court at Allahabad has held that a Court is not competent by any order for the affixing of further stamps to allow a suit practically to be filed after the time for limitation has expired; *Jainti v. Bachu*, I. L. R. 15 All. 65. Where a plaint was received and subsequently irregularly returned to be presented at a later period, the date of first presentation is the date up to which limitation is to be calculated; *Jorabaz v. Pir Baksh*, Panj. Rec. No. 22 of 1887.

*Amendment.*—The fact that a plaint or application, on presentation, is returned to be amended, does not prevent the date of first presentation being the date to be used for the purpose of deciding the question of limitation; *Greesh Chunder v. Pran Kishen*, 7 W. R. 157; *Jagannath v. Lalman*, I. L. R. 1 All. 260, and the cases cited in note (1) on p. 261; *Ram Lall v. Harrison*, I. L. R. 2 All. 832; *Sheo Partab v. Gholam*, I. L. R. 2 All. 875.

Where an application by co-sharers to be made parties was made to, and refused by, the Court of first instance, and the Court of Appeal subsequently ordered the applicants to be made parties, it was held for the purposes of limitation that the addition should be made *nunc pro tunc*; *Ramkrishna v. Ramabai*, P. J. 1892, p. 19. Where a plaintiff's name was struck out from the heading of a plaint without his authority and the plaint so filed, and he applied to have his name restored as plaintiff which was granted, the restoration must relate back to the filing of the plaint; *Kirparam v. Dayalji*, P. J. 1894, p. 15. Where under a decree of 1809, the appellant was entitled to certain yearly payments in respect of land, and in 1887 obtained a declaratory decree against purchasers of a portion of that land, but made no mention in the decree of the decree of 1809; he was allowed to amend a petition for execution of the later decree by inserting a reference to the earlier one, although at the time of amend-

ment execution in respect of certain yearly payments was barred, *Sattappa v. Jogi Soorappa*, I. L. R. 17 Mad. 67.

Where, after a plaint has been accepted, an amendment is made limiting the prayer for relief to a portion of the subject matter of the suit, the date of presentation is the date of the institution of the suit; *Patel Mafatlal v. Bai Parson*, P. J. 1894, p. 135.

In England a mere formal amendment of a writ is allowed, even though between the date of the writ and the day of amendment limitation has begun to run in respect of some part of the claim. Thus, where a writ had been issued in which the name of the Lord Chancellor had been omitted, the space for its insertion having been left blank, it was held that the Court could amend the writ, although in the meantime the statute of limitations had begun to run; *McNay v. Alt*, 36 Sol. J. 504. An amendment cannot, however, be allowed, if it would introduce new causes of action which would be barred if a new writ had to be issued; *Weldon v. Neal*, 19 Q. B. D. 394; nor where the writ on the face of it is invalid; *The W. A. Sholten*, 13 P. D. 8.

If a suit be instituted against a minor without a guardian *ad litem* the date of the presentation of the plaint is the date of institution, although a guardian may not be appointed for some time afterwards; *Khem Karan v. Har Dayal*, I. L. R. 4 All. 37.

A plaint, &c., must also be presented to the proper person and in the proper manner in order to save limitation; *Akshoy v. Chunder Mohini*, I. L. R. 16 Calc. 250. Where a Court or Judge is that person, the leaving of a plaint with a *karkun* in charge of the Court-office is not sufficient; *Nundvullubh v. Allibhai*, 6 Bomb. H. C. Rep. A. C. J. 254; nor is the placing of the plaint on the table of the officer when he himself is not present; *Taj Uldeen v. Ghafur*, 3 N. W. 341; *Ramaya v. Muhammadbhai*, 10 Bomb. H. C. Rep. 495. An application for a review presented on insufficiently stamped paper does not save limitation; *Munro v. Cawnpore Municipal Board*, I. L. R. 12 All. 57; nor does the presentation of an appeal improperly stamped save limitation; *Balkaran v. Gobind Nath*, I. L. R. 12 All. 138. In the last cited case *Skinner v. Orde*, *ubi sup.* is discussed and distinguished.

The High Court at Madras has, however, held that where the petition of appeal was presented unstamped within the period of limitation, and the stamp was ultimately affixed after the appeal would have been barred by limitation, the appeal was in time; *Patcha Saheb v. Sub-Collector of North Arcot*, *I. L. R.* 15 *Mad.* 78. The foregoing Allahabad case was doubted in *Huri Mohun v. Naimuddin*, *I. L. R.* 20 *Calc.* 41; and not followed in *Moti v. Chhatri*, *I. L. R.* 19 *Calc.* 780. See also *Syed Ali v. Kalli Chand*, 24 *W. R.* 258. An appeal must also be accompanied by all such documents as are prescribed by the Civil Procedure Code; *Balkaran v. Gobin Nath*, *ubi sup.*; *Bhag v. Jandu*, *Panj. Rec.* No. 7 of 1879, and *Nihal v. Johar*, *Panj. Rec.* No. 147 of 1879; followed in *Akbarali v. Ramchand*, *ib.* No. 53 of 1887.

Rules of Court prescribing certain hours for the receipt of petitions and hearing of motions cannot be allowed to operate so as to curtail the period of limitation allowed by law, and thus prevent a plaint, &c., being presented up to the last moment of the Court's sitting on the day before limitation commences to operate; *Desputty v. Doolas*, 1 *C. L. R.* 291; *Shivdial v. Aladin*, *Panj. Rec.* No. 140 of 1884. The mere filing of a plaint will not stop limitation running unless the plaintiff takes proper steps to compel the defendant to appear; *Ramkissen v. Luckeynarain*, *I. L. R.* 3 *Calc.* 312, and the English cases cited therein; *Greender v. Juggodumber*, *I. L. R.* 5 *Calc.* 126.

*Application.*—A notice to the opposite party, whether issued by the party himself, or by the Registrar, to attend on a certain date is not the making of an application, but the period of limitation will be counted up to the date on which the application is actually made; *secus*, where an application is made to the Court or a Judge and a rule *nisi* or a summons is thereupon granted; *Khetter Mohun v. Kasay Nath*, *I. L. R.* 20 *Calc.* 899.

*Prisoner.*—In the case of appeals by prisoners in jail, presentation of the petition of appeal to the officer in charge of the jail is equivalent to presentation to the Court; *Emp. v. Lingaya*, *I. L. R.* 9 *Mad.* 251.

*Claims against Companies in Liquidation.*—Under the Companies' Act, 1857, it was held that a claim sent in to the official liquidator of a company in liquidation was barred if it was not sent in before the period of limitation provided for the subject-matter of the claim had expired; *In re Ganges Steam Navigation Co.*, 2 *Ind. Jur. N. S.* 180, 181. In 1866 a new Companies' Act was passed, and in 1871, the Limitation Act, 1871, was passed, Sect. 4 of which provided in the *Explanation*, that a suit is instituted, in the case of a claim against a company which is being wound up by the Court, when the claimant first sends in his claim to the official liquidator, thus confirming the ruling in the cases above cited; and at this time the law in England seems to have been the same. In 1872, however, in *In re The General Rolling Stock Co.*, L. R. 7 Ch. 646, the Lords Justices held that as soon as a company was placed in liquidation, limitation ceased to run against claims due at the date of going into liquidation, and that case seems to have been tacitly acted upon in India up to the present time without any notice having been taken of the *Explanation* to Section 4 of the Limitation Act, 1871, which was transferred *verbatim* to the present Act. In the first edition of this work at p. 11, it was pointed out that a claim made to an official liquidator would be barred if not made within the time provided by this Act for a suit, but no opportunity occurred to bring the matter before a Court until the matter of *The Fleming Spinning & Weaving Company* and *Joosub Haji Ahmed* came up for final decision, and then the High Court at Bombay decided that in cases governed by the Indian Companies' Act, 1866, the law as laid down in England in *The General Rolling Stock Co.* could not prevail against the provisions of the Limitation Act; and that a claim to an official liquidator must be made within the time limited for the filing of a suit for the same subject-matter; and that a claim made to the liquidator of a company in liquidation under the supervision of the Court stood upon the same footing as a claim made to the official liquidator of a company in liquidation by the Court. This case was decided on the 18th July, 1890, but has not yet been reported.

This ruling, however, does not apply to companies which have gone into compulsory or voluntary liquidation since the 1st May, 1882, the date on which the Indian Companies' Act, 1882, came into force, for by Sects. 147 and 177 it is provided that the assets of companies in liquidation shall be applied in discharge of the liabilities existing at the date of the order of the Court for winding-up, or the commencement of the winding-up, as the case may be, and by these sections the provision of Sect. 4 of the Limitation Act now under discussion is practically repealed.

*Defendants.*—The provisions of the Limitation Act do not in terms apply to defendants, and the High Court at Calcutta has refused to lay down a general rule that a defendant cannot set up a right as a defence which he would be precluded by the Limitation Act from setting up as a plaintiff by way of a substantive claim; *Ram Narain v. Behary Lall*, 2 C. L. R. 5. In Bombay, however, it has been ruled that where vendors were barred from filing a suit to set aside a sale on the ground that they had been cheated, their tenants were not allowed to plead the invalidity of the sale in defence to a suit by the purchasers to recover possession of the property from them; *Jugaldas v. Ambashankar*, I. L. R. 12 Bomb. 501. This case was commented on and distinguished in *Hurgovindas v. Bajibhai*, I. L. R. 14 Bomb. 222. The Madras High Court has since held that where defendants were in possession they were not estopped from pleading that a lease upon which the plaintiff relied had been obtained by fraud from the *Zemindar* under whom the defendants claimed, although the time for a suit to have the plaintiff's lease set aside on that ground had gone by; *Orr v. Sundra Pandia*, I. L. R. 17 Mad. 255.

*Set-Off.*—By the Civil Procedure Code, 1882, Sect. 111, a set-off is to have the same effect as a claim in a cross-suit, consequently the plaintiff can plead limitation to such a claim, but the question is, what is the period up to which limitation is to be counted, the date of the filing of the plaint, or that of the filing of the claim to set-off. In England it has been held that 21 Jac. I., c. 16, is not a bar to a set-off, unless the six years have expired



before the action is brought; *Walker v. Clements*, 15 Q. B. 1046; *Lovell v. Forester*, L. R. W. N. 1890, p. 64.

*Ministerial Acts.*—The provisions of a Limitation Act do not apply to applications to a Court to do what it has no discretion to refuse, nor to applications for the exercise of functions of a ministerial character; *Kylasa Goundan v. Ramasami*, I. L. R. 4 Mad. 172; *Vithul v. Vithojirav*, I. L. R. 6 Bomb. 586; *Ishwardas v. Dossibai*, I. L. R. 7 Bomb. 316, at p. 322; passing a judgment on an award after it has been filed, and issuing a certificate of sale after a sale in execution, are acts of this nature.

The Crown is not bound by the provisions of any Act unless they are expressly declared to be binding on it, but from the fact that this Act contains a special provision prescribing a term of limitation to Government for the institution of suits and the presentation of criminal appeals, it may be inferred that the Legislature contemplated that the Crown should be subjected to all the provisions of the Act with regard to limitation, and should enjoy a privilege to the extent expressed and no further. Consequently, the Crown is subject to the ordinary provisions herein in respect of applications; *Appaya v. Collector of Vizagapatam*, I. L. R. 4 Mad. 155.

An agreement not to plead limitation does not prevent the point being taken and the suit dismissed thereon, but such an agreement, if made for good consideration, may form the ground for a suit if it be broken; *East India Co. v. Oditchurn Paul*, 5 Moore I. A. 70; *Lade v. Trill*, 6 Jur. 272.

An order rejecting a memorandum of appeal under the provisions of this section as barred by limitation is a decree within the meaning of Sect. 2 of the C. P. C.; *Gulab Rai v. Mangli Lal*, I. L. R. 7 All. 42.

**Sect. 5.** *Court closed when period expires. Admission after expiration of period.*—If the period of limitation prescribed for any suit, appeal, or application, expires, on a day when the Court is closed, the suit, appeal, or application may be instituted, presented, or made on the day that the Court re-opens :

**Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.**

**Sect. 5A.** *Limitation for certain appeals or applications for review of judgment.*—Whenever it is shown to the satisfaction of the Court that an appeal or an application for a review of judgment was presented after the expiration of the period of limitation prescribed for such appeal or application owing to the appellant or applicant having been misled by any order, or practice, or judgment of the High Court of the Presidency, Province, or District, such appeal or application, if otherwise in accordance with law shall for all purposes be deemed by all Courts to have been presented within the period of limitation prescribed therefor. [Act VI of 1892.]

*Notes.*

Section 5 is the same as the corresponding section in Act IX of 1871. The wording of the two clauses of this section should be carefully distinguished, as it would appear that it was intended to draw a clear distinction between what are styled “applications” and what are styled “appeals.” Under the first clause *any* suit, appeal, or application may be presented on the day the Court re-opens, as of right, if the suit, &c., has become barred while the Court is closed; *King v. King*, *I. L. R.* 6 *Bomb.* 487; but the Court at any other time after the expiry of the period of limitation prescribed can only admit appeals and *applications for a review of judgment*, it cannot after that time admit any other application, nor a suit; *Lukshmi v. Ananta Shambaya*, *I. L. R.* 2 *Mad.* 230; *Kally Prosunno v. Mangala*, *I. L. R.* 9 *Calc.* 631; following *Degumber v. Kallynath*, *I. L. R.* 7 *Calc.* 659; in which case, however, the right reason for the decision was not given. The reason given was that the particular period of limitation was not fixed by Schedule 2. On reference, however, to the notes to Sect. 6, it will be seen that

this section among others applies to special and local laws of limitation, and the real reason, as shewn in *I. L. R. 9 Calc. 631*, is, that in neither of the cases was the matter in question an appeal or a review of judgment; see also *In re Ram Sunker*, 3 *O. L. R.* 442; *Benode Mohini v. Sharrat Chunder*, 10 *O. L. R.* 451; *S. C.*, *I. L. R. 8 Calc. at p. 84*. Thus an application for *leave to appeal* as a pauper cannot be admitted after the time prescribed by Art. 170; *Lakshmi v. Ananta Shambaya*, *ubi sup.*; *Parbati v. Bhola*, *I. L. R. 12 All. 79*; *Bechi v. Ahsan Ullah*, *I. L. R. 12 All. 489*, *per Edge*, *C. J.*; followed, *In re Sita Ram*, *I. L. R. 15 All. 14*, in respect to an application to admit an appeal to the Privy Council.

The "period of limitation prescribed" in a case coming within one of the articles in Schedule 2, is that prescribed by this Act; *Chunilal Ichharam v. Tribhovan Laldas*, *I. L. R. 5 Bomb. 688*; or by the Act which prescribes the period of limitation in cases where the period provided by this Act is not applicable; see the notes to Sect. 6.

This section applies to a suit under Sect. 77 of the Registration Act III of 1877; *Naguhya v. Balu Mal*, *Panj. Rec. No. 74* of 1890.

Sect. 372A, C. P. C., makes the provisions of the second clause of this section applicable to appeals applicable to applications under Sects. 365, 366, 368 and 371, C. P. C.; and Sect. 582 applies this section, through Sect. 372A, to appeals under Chap. XLI, C. P. C.

*Court closed.*—This expression implies that the Court is closed for the transaction of such business as is implied in filing a suit, an appeal, or making an application. The Court-offices may be actually open for other purposes, but if there is no one lawfully required to be present who can receive a plaint or a petition of appeal, or application, the Court for purposes of this section will be held to be closed, because these applications must be made to the proper person; see *Nandvullubh v. Alibhai*, 6 *Bomb. H. C. Rep. 254*; *Akshoy v. Chunder Mohun*, *I. L. R. 16 Calc. 250*; and although for the convenience of business there is some one present who is entitled to receive the plaint, &c., but no one who can decide that it shall be admitted and put on the files of the

Court, the plaint, &c., is in time if presented on the first day on which there is such last mentioned officer present; *Ganpat v. Hira*, *Panj. Rec.* No. 29 of 1891.

Where, however, a Court adjourned for two months, but the Court-office was open twice a week for the reception of plaints, petitions, and other papers, it was held, by a majority of a Full Bench, that the Court was not closed during the whole of the adjournment, so as to allow an appellant, whose time for appealing had expired in the middle of the adjournment *as of right* to present his appeal on the first day the Court sat after the adjournment; *Nachiyappa v. Ayyasami*, *I. L. R.* 5 *Mad.* 189. If the offices of a court are open for the transaction of emergent business, and there is also a Judge or Clerk of the Court at hand for the purpose of attending to plaints, appeals, and applications; plaints, appeals, and applications which are about to become barred during vacation should be presented, filed, or made before the period of limitation actually expires; and if not presented till the Court fully re-opens after the vacation, it cannot be said that the Court was closed at the time they ought to have been presented in the ordinary course of things; *Shivram v. Bhavania*, *P. J.* 1886, p. 262; *Parvathesam v. Bapanna*, *I. L. R.* 13 *Mad.* p. 451. Where a Court did not re-open on the day appointed after the vacation, but, under an unauthorized order of a higher Court, some days later, it was held that a plaint presented on the first day the Court was *actually* open was in time; *Bishan Chand v. Ahmad Khan*, *I. L. R.* 1 *All.* 263.

The general principle of law is that, although parties themselves cannot extend the time for doing an act in Court, yet if the delay is caused, not by any act of their own, but by some act of the Court itself, such as the fact of the Court being closed, they are entitled to do the act on the first open day; *Waterton v. Baker*, *L. R.* 3 *Q. B.* 173; *Mayer v. Harding*, *L. R.* 2 *Q. B.* 410. Consequently when the Court is closed on the last day on which under the Bengal Tenancy Act, 1885, Sect. 174, a deposit can be made on which to found an application to set aside a sale for arrears of rent, the deposit can be made on the first day the Court re-opens; *Shooshee v. Gobind*, *I. L. R.* 18 *Calc.* 231. So, where a decree

dated the 7th September 1879 was transferred for execution to the Court at B, on the 2nd September 1891, but that Court being closed from the 3rd to the 8th, an application for execution was made on the 9th; it was held that execution should be granted, although more than twelve years had elapsed since the passing of the decree; *Peary Mohun v. Anunda*, I. L. R. 18 Calc. 631.

When the time for filing objections under Sect. 561, C. P. C., expires on a day when the Court is closed, it is sufficient if such objections are filed on the day the Court re-opens; *Baghelin v. Mathura*, I. L. R. 4 All. 430; *secus Kally Prosunno v. Mangala*, I. L. R. 9 Calc. 631; following *Degamber v. Kallynath*, I. L. R. 7 Calc. 654; 5 C. L. R. 265.

*Sufficient cause.*—It is absolutely impossible to lay down any hard and fast rule as to what is sufficient cause; “The Court has the power to grant the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires, that leave should be given;” *per Brett, M. R., In re Manchester Economic Building Society*, 24 Ch. D. 497. To say that the leave of the Court would never be granted except in certain special circumstances, and in a defined way would be very perilous, but the discretion of the Court is to be exercised in the way in which judicial power and discretion ought to be exercised, upon principles which are well understood, but which had better not be defined in a case, except so far as may be necessary for the decision of the case; see judgment of *Bowen, L. J., ib.* 503. The point to be determined is whether cause has been shown for non-presentation of the appeal, &c., within the time limited, and if that is done, then it is within the judicial discretion of the Court to admit the appeal, &c., even though it might have been presented sooner than it actually was. *Ghulam v. Shahbaz, Panj. Rec.* No. 161 of 1888. An honest mistake of suitor or counsel would be a sufficient cause; *Johnson v. Warwick*, 17 C. B. 516; *Pritchard v. Pritchard*, 14 Q. B. D. 55; so is some action of the Court which has misled suitors or the bar, even although strictly it ought to have been known that that action had been set right by the Court itself or by a superior Court; *ib.* 57; see also the remarks of *Wilson, J., in Gopal*

*Chandra v. Solomon*, I. L. R. 13 Calc. at p. 66. Sect. 5A, added by Act VI of 1892, provides for mistakes made through the action of a Court.

*Sufficient cause.—Appeals.—Pendency of review.*—The pendency of an application for a review of a decree or judgment is a good ground for not presenting an appeal; for it is right for a man to ask a Court to rectify what he considers an incorrect decree before he appeals; *Nobbo Kissen v. Kaminee*, 2 W. R. Misc. 35 (F. B. decision of 14 Judges); *In re Brojendro Coomar*, 7 W. R. 529; *Poresb Nath v. Gopal Kristo*, 15 W. R. 61; *Kuller v. Jeewun*, 22 W. R. 79; *Trimbakraj v. G. I. P. Ry. Co.*, P. J. 1880, p. 345; and a man is justified in asking for a review if he has a reasonable prospect of obtaining in that way all the relief he could get by an appeal; *Vasudeva v. Chinnasami*, I. L. R. 7 Mad. 584; but the application for review must be presented and prosecuted with due diligence, as the time occupied by the review cannot be excluded as of right; *ib.*; and it must be shewn that there were reasonable grounds for asking for a review; *Ashanulla v. Collector of Dacca*, I. L. R. 15 Calc. 342; *Govinda v. Bhandari*, I. L. R. 14 Mad. 81; *Pundlik v. Achut*, I. L. R. 18 Bomb. 84; and the appellant should be diligent in preferring his appeal as soon as possible after the review has been disposed of; *Ganga v. Madho*, Panj. Rec. No. 89 of 1882; *Sahiba v. Hira*, *ib.* No. 166 of 1883; *Karm Baksh v. Daulat Ram*, *ib.* No. 183 of 1888.

*Prosecution of other proceedings.*—The circumstances contemplated in Sect. 14 *might*, and *ordinarily would*, constitute a sufficient cause. Thus, where the appellant, until after the time for appealing had expired, had been occupied in prosecuting with due diligence and in good faith an application to the Court in its revisional jurisdiction for the same relief sought in appeal, which was dismissed for want of jurisdiction, it was held that this was sufficient cause; *Bulwant Singh v. Gumani Ram*, I. L. R. 5 All. 591; see also *Ramjivan v. Chand Mal*, I. L. R. 10 All. at p. 592. Where A applied to have an attachment removed from certain property, but was unsuccessful, and then filed a suit for the same purpose which was subsequently dismissed, after which he filed an appeal against the order dismissing his application; it was held

that the time actually occupied by the suit might be deducted in computing the delay which occurred before the appeal was filed, but not the time which elapsed between the date of the order appealed against and the filing of the suit; *Sitaram v. Nimba*, I. L. R. 12 Bomb. 320; which was distinguished in *Chudasama v. Mahunt Ishwargar*, I. L. R. 16 Bomb. 249.

*Wrong Court.*—The fact that an appellant *bond fide* believed that his appeal ought to be filed in the High Court until his Calcutta Agents informed him to the contrary, and in the meantime the period for appeal to the District Court had elapsed, may amount to a sufficient cause for the District Court admitting his appeal after time; *Huro Ohunder v. Surnamoyi*, I. L. R. 13 Calc. 266; *Sardar Partap v. Lala Karam*, Panj. Rec. No. 184 of 1889. Where a *purda* lady was appellant and presented an appeal to the Divisional Court, which dismissed it; and the appellant then appealed to the Chief Court, when it was discovered that the value was over Rs. 5,000, and that it ought to have been presented to the Chief Court direct; it was held that there was sufficient cause for not filing the appeal in the proper Court within the time limited, and that she had acted with due diligence in presenting it within four days after she had received it back from the Divisional Court; *Gouhar v. Khan Muhammad*, Panj. Rec. No. 66 of 1891.

The High Court at Allahabad has, however, ruled that the presentation of an appeal to a wrong Court, through a mistake in, or ignorance of, law is not a sufficient cause; *Jag Lal v. Har Narain*, I. L. R. 10 All. 524; *Ranjivan v. Chand Mal*, *ib.* 587. The High Court at Bombay has also ruled that mere ignorance of the law cannot be recognised as a sufficient reason for delay; *Sitaram v. Nimba*, I. L. R. 12 Bomb. 320; but the High Court at Madras is not prepared to hold that a mistake in law is under no circumstances a sufficient cause within this section, but that a decision ought to be come to on the particular circumstances of each case; *Krishna v. Chathappan*, I. L. R. 13 Mad. 269; disagreeing with *Jag Lal v. Har Narain*, *ubi supra*.

*Sickness.*—Where the reasons for the appeal had not been filed within the time prescribed by Act XV of 1858, in consequence of

the absence of the appellant's Mooktiar through illness, and the appellant was not aware that the reasons had not been filed, and there had been no wilful delay, it was held that this was an unavoidable accident under that Act; *Anandmoyee v. Pournoo*, 9 *Moore I. A.* 26; but a mere plea of sickness is no ground for interfering with the order of a Judge rejecting an appeal not filed within time; *Mazoom Ali v. Panchoo*, 1 *W. R. Misc.* 23.

*Cross-objections.*—The circumstance that a respondent has filed cross-objections to a decree appealed against, which he has been prevented from arguing by the appeal being withdrawn is no reason why he should be permitted to file an appeal based on those objections after the time for appeal may have expired; *Jaitu v. Balu*, 3 *Bomb. H. C. Rep. A. C. J.* 81; *Surbhai v. Raghunathji*, 10 *Bomb. H. C. Rep. A. C. J.* 397; following *Mowri v. Soorendra*, 2 *B. L. R. A. C.* 184; 10 *W. R.* 178; *Chudasama v. Mahant Ishwargar*, *I. L. R.* 16 *Bomb.* 249. In Calcutta, to get such permission, he must shew conclusively that he was actually prepared to file the appeal within time if the other side had not filed their appeal; *Gour Hari v. Pran Nath*, 12 *C. L. R.* 395.

*Mistake of counsel, &c.*—The fact that the plaintiff's attorney, on being served with the notice of appeal, failed to observe that a party defendant in the Court below had not been made a respondent in the appeal, coupled with the fact that the application to file an appeal against such party was not made at the very earliest time, is not sufficient cause for allowing such appeal to be filed; *Corporation of Calcutta v. Anderson*, *I. L. R.* 10 *Calc.* 445. In a subsequent case *Norris, J.*, admitted a review after the time had expired where the counsel on one side had unintentionally misstated the effect of a deed and the counsel on the opposite side, without examining the deed, had accepted such misstatement as true and had conducted his case on the faith of it, and application for a review had been made as soon as possible after the mistake was found out; *Gopal Chunder v. Solomon*, *I. L. R.* 11 *Calc.* 767; but this order for review was set aside on appeal; *I. L. R.* 13 *Calc.* 62, on the ground that no sufficient cause was shewn for not applying within the time; see also



*Bishan v. Kishan*, *Panj. Rec.* No. 30 of 1886, a case of wrong advice being given by a pleader.

*Poverty. Purdah-nashin.*—The poverty of an appellant, in consequence of which he was not able to pay Court fees in time, is no reason for admitting an appeal after the time for appealing has expired; *Moshaullah v. Ahmedullah*, *I. L. R.* 13 *Calc.* 78; approved by *Mahmood, J.*, in *Husaini v. Collector of Muzaffarnagar*, *I. L. R.* 9 *All.* 11 (but not followed by *Tyrell, J.*). The judgment of *Mahmood, J.*, was subsequently approved on appeal; *I. L. R.* 9 *All.* 655; see also, *Bechi v. Ahsan-Ullah*, *I. L. R.* 12 *All.* pp. 489, 490. The fact that an appellant is a *purdah-nashin* is no ground for extending time, unless it was that fact itself which prevented her from taking steps in proper time; *per Mahmood, J.*, in *Husaini v. Collector of Muzaffarnagar*, *I. L. R.* 9 *All.* at p. 18.

*Alteration of law.*—The fact that a judgment altering the law has been delivered in another case, after the time for appealing or applying for a review has expired, is no reason for admitting an appeal or review after time; *Makhan v. Manchand*, 5 *Bomb. H. C. Rep. A. C. J.* 107; *Shamachurn v. Bindabun (F. B.)*, 9 *W. R.* 181; *Mowra Bewa v. Soorundranath*, 10 *W. R.* 178; *Jadub Ram v. Ram Lochini*, 19 *W. R.* 189; *Madhudas v. Rukman*, *I. L. R.* 2 *All.* 287; but if, for other reasons, an appeal or application for review be admitted, under such circumstances, the case will be governed by any new exposition of law; *Shamachurn v. Bindabun*, *ubi sup.* Where a judgment settling a point of law which arises in a case has been delivered before the decision in that case, but not reported till afterwards, that is a reason for granting a review of judgment after the time has expired; *Achuta v. Mammavu*, *I. L. R.* 10 *Mad.* 357. Two suits were filed by the same plaintiff against different defendants in both of which the same document had to be construed. The defendant in one suit appealed against the decree therein founded on a construction of the document common to both suits, and the decree was reversed. Thereupon the plaintiffs in the second suit applied for the admission of an appeal against the decree in the other suit, on the ground that there were two decrees

giving opposite effects to the same document, and that the result would be a deadlock ; but it was held that sufficient cause had not been shewn for admitting the appeal ; *Vussonji Mowji v. Canji Purbhut*, I. L. R. 14 Bomb. 365.

*Sufficient cause. Review.*—The mere fact that an appeal has been pending in the same case is no ground for delaying to ask for review ; *Fakira v. Basapa*, 8 Bomb. H. C. Rep. A. C. J. 234 ; *Lucas v. Stephens*, 9 W. R. 301 ; *Gulam Husen v. Sayad Musa*, I. L. R. 8 Bomb. 260.

The applicant's ignorance of the true effect of a judgment or decree is no justification for delay ; *Gulam Husen v. Sayad Musa*, *ubi sup.*

*Alteration of law.*—See *ante*, p. 28.

*New evidence.*—Where the applicant for a review alleged, eighteen months after the time for the application had expired, that he had, from soon after the passing of the decree, been engaged in collecting evidence in support of a custom, which had not been set up in the Court below, and no instance given in evidence, and no application made that such an issue should be raised, it was held that this was not sufficient cause ; *Gopal v. Hanmant*, I. L. R. 6 Bomb. 107.

*Objection to review or appeal admitted after time.*—The fact that an appeal or review has been admitted on the file on an *ex parte* motion does not prevent the opposite party from shewing that no sufficient cause for such admission existed ; *Secretary of State v. Mootoo*, 13 W. R. 245 ; *Ramey v. Broughton*, I. L. R. 10 Calc. 652 at p. 653 ; even though the appeal has been admitted by the District Judge and referred by him for hearing to the First Class Subordinate Judge with appellate powers ; *Mulna v. Krishnaji*, I. L. R. 14 Bomb. 594 ; dissenting from *Jhotee Sahoo v. Omesh Chunder*, I. L. R. 5 Calc. 1 ; and the High Court can, in appeal, review the reasons of a lower Appellate Court for admitting an appeal out of time, when the discretion of that Court has been exercised without any proper legal materials to support it ; *Mowra Bewa v. Soorundranath*, 10 W. R. 178 ; *Surbhai v. Rughunathji*, 10 Bomb. H. C. Rep. A. C. J. 397 ; *Nobin Chunder v.*

*Brojendro*, 12 C. L. R. 545; *Venkatrayudu v. Nagadu*, I. L. R. 9 Mad. 450; *Gharib v. Porlo Mal*, Panj. Rec. No. 92 of 1886; but it must be shewn that the lower Court has clearly acted on insufficient grounds, or has improperly exercised its discretion; *Fatima v. Hansi*, I. L. R. 9 All. 244; not approved of in *Bechi v. Ahsan Ullah*, I. L. R. 12 All. 492; but the High Court cannot do this on revision; *Vasudeva v. Chinnassami*, I. L. R. 7 Mad. 584.

*Question as to stamps.*—The fact that there is a dispute between the officer of the Court and a party as to the amount of fees payable on a review, is not sufficient cause for the application for the review not being filed in proper time; *Munro v. Cawnpore Municipal Board*, I. L. R. 12 All. 57. Where an application is lodged within ninety days, but is not accepted for want of a proper stamp, although it is allowed to remain in the Court office, a Judge cannot, after the expiration of ninety days, treat it as an application made after ninety days and adjudicate upon it accordingly; *ib.*

An application for the admission of an appeal rejected by an officer of the Court must be made as early as possible after rejection; *Ramey v. Broughton*, I. L. R. 10 Calc. 652, at p. 662.

*Objection to decree by respondents.*—The seven days within which a notice of objection to a decree by a respondent must be filed is not a period to which the provisions of the second clause of this section can be applied, and the Court has no discretion to extend the period; *Degumber v. Kallyanath*, I. L. R. 7 Calc. 654. Now, however, it is provided that objections may be filed within one month from the date of service upon the respondent of notice of the day of hearing, or within such further time as the Appellate Court may see fit to allow; C. P. C. Sect. 561.

**Sect. 6. Special and local laws of limitation.**—When, by any special or local law now or hereafter in force in British India, a period of limitation is specially prescribed for any suit, appeal or application, nothing herein contained shall affect or alter the period so prescribed.

*Notes.*

The general rule regarding limitation is that when once time has begun to run, it continues to run, and its operation is not liable to be suspended on any days, or during any special times, or for personal reasons. By Act IX of 1871 provisions were made suspending the operation of limitation during certain periods specified therein, but Sect. 6 provided that *nothing in that Act contained* should affect any act not mentioned in the Schedule. Consequently, under that Act, the general principles of limitation were left to have their full effect in all cases which were not specially provided for by it; *Timul Kesari v. Ablakh Rai*, I. L. R. 1 All. 254; *Thier Sing v. Venkataramier*, I. L. R. 3 Mad. 92.

The present section, however, only excepts from the operation of the Limitation Act of 1877 the *periods* of limitation prescribed by special or local laws, which periods therefore remain unaffected by this Act, but the general principles of this Act and the rules prescribed thereby for the computation of periods of limitation, so far as they are applicable to particular cases, apply to cases for which particular periods of limitation are provided by special and local laws; *Behari v. Munglonath*, I. L. R. 5 Calc. 110; *Parbuttinath v. Tejomoy*, ib. 303; *Gopalchund v. Krishto Chunder*, ib. 314; *Khoshilal Mahton v. Gunesh Dutt*, I. L. R. 7 Calc. 69; *Nijabuttulla v. Wazir Ali*, I. L. R. 8 Calc. 910; *S. C. 10 C. L. R.* 333; *Khetter Mohun v. Denabachy Shaha*, I. L. R. 10 Calc. 265; and *Guracharya v. Belgaum Municipality*, I. L. R. 8 Bomb. 529; I. L. R. 10 Mad. 210; *Seshama v. Sankara*, I. L. R. 12 Mad. 1; *Venkata v. Chengadu*, ib. 168; *Kullayappa v. Lakshmipathi*, ib. 467. But this section prevents a plaintiff from taking advantage of any of the provisions of this Chapter which extend the period of limitation; thus a plaintiff suing under Ben. Act VIII of 1869, for arrears of rent, is not entitled to the benefit of Sect. 7, if any of the arrears fell due while he was a minor; *Girija Nath v. Patani*, I. L. R. 17 Calc. 263. It also prevents the provisions of Sect. 14 being applicable to suits for arrears of rent under Act X of 1859; *Nagendro v. Mullick*, I. L. R. 18 Calc. 368 (P. B.); following *Unnoda v. Kristo Oommar* (P. C.), 15 Ben. L. R. 60, n.; 19 W. R. 5.

But in spite of this section, the High Court of Madras held that, if certain rules for appeals from an Agent to the Governor fixed a time within which an appeal was to be prepared, the appellant was entitled to the time necessary for obtaining a copy of the judgment appealed against; *Mahadevi v. Vikrama*, *I. L. R.* 14 *Mad.* 365.

*Mad. Reg.* IV of 1816, Sect. 5, prohibits a village Munsiff from taking cognizance of *any* suits more than twelve years old, but that is not a rule of limitation which is preserved by this section; *Erajabai v. Mayan*, *I. L. R.* 9 *Mad.* 118.

A classified list of the special and local laws affecting limitation, now in force, would occupy too much space to be included in the present work, but a list of them will be found in the Index to Enactments in force in India, published by the Government.

**Sect. 7. *Legal disability. Double and successive disabilities. Disability of representative.***—If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned, a minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.

When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period, after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.

When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed.

**When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this section shall apply.**

**Nothing in this section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made.**

*Illustrations.*

- (a) **The right to sue for the hire of a boat accrues to A during his minority. He attains majority four years after such accruer. He may institute his suit at any time within three years from the date of his attaining majority.**
- (b) **A, to whom a right to sue for a legacy has accrued during his minority, attains majority eleven years after such accruer. A has, under the ordinary law, only one year remaining within which to sue. But under this section an extension of two years will be allowed him, making in all a period of three years from the date of his attaining majority, within which he may bring the suit.**
- (c) **A right to sue accrues to Z during his minority. After the accruer, but while Z is still a minor, he becomes insane. Time runs against Z from the date when his insanity and minority cease.**
- (d) **A right to sue accrues to X during his minority. X dies before attaining majority and is succeeded by Y, his minor son. Time runs against Y from the date of his attaining majority.**
- (e) **A right to sue for a hereditary office accrues to A, who at the time is insane. Six years after the accruer A recovers his reason. A has six years, under the ordinary law, from the date when his insanity cease within which to institute a suit.**

No extension of time will be given him under this section.

- (f) A right to sue as landlord to recover possession from a tenant accrues to A, who is an idiot. A dies three years after the accruer, his idiocy continuing up to the date of his death. A's representative in interest has, under the ordinary law, nine years from the date of A's death within which to bring the suit. This section does not extend that time, except where the representative is himself under disability when the representation devolves upon him.

*Notes.*

This section is a re-enactment of the principle contained in Sect. 7 of the Act of 1871, but there are a few alterations in the details. The Act of 1871 only provided for a right to sue, the present section provides for a right to sue and to make applications; but it does not provide for the case of a man being under disability at the time he might have a right to appeal, unless "appeal" is included under "application," which would seem to be doubtful, though a person might be insane at the time judgment was pronounced and not recover till after the time for appealing had expired. If he became insane after judgment was pronounced, Sect. 9 would apply. Then, the period at which he must have been under disability under the former Act was the time when the right "accrued," under the present Act it is "the time from which the period of limitation is to be reckoned," and in some cases there may be a difference between the two dates. The old Act only provided for a person being affected by two disabilities at *the time of the accrual of the right*, the present Act provides for one disability supervening upon another, and it also applies to the representative of a person the same provisions as apply to the person himself. Lastly, the present section excludes from its operation suits to enforce rights of pre-emption.

This section only applies to suits brought *by* persons under disability, and not to suits brought against such persons; see

*Sham Charan v. Chowdhry Debya*, I. L. R. 21 Calc. 872, where the ordinary law of limitation was applied in favour of an infant.

This section only applies to cases in which a period of limitation has been fixed by law, and not to the case of an order made by a Court for the payment of money by a certain time; *Prema v. Jawahir*, Panj Rec. No. 31 of 1884.

This section, as was also Sect. 7 of Act IX of 1871, is somewhat involved and difficult to construe with regard to the actual amount of time allowed.

The first clause of the section provides that limitation shall begin to run from the cessation of the disability in the same way as if that was the time prescribed by the second schedule to the Act for the commencement of the running of limitation, and that the person previously under disability shall have the same number of years, &c., from that time as is prescribed by the schedule in ordinary cases; *Jungo Lall v. Lalla Alum*, 7 W. R. 279. This was a case of pre-emption which is excepted from the operation of the present section, but the principle still applies. Thus, in a suit for compensation for false imprisonment he would have one year from the date of the disability ceasing; and he would have the same time to set aside a sale under a Court decree; *Subramanya v. Siva Subramanya*, I. L. R. 17 Mad. 316. Then the fifth clause comes in and provides that if such computation *extends* the time fixed for limitation beyond the period when the claim would be barred if calculated from the ordinary starting point, such *extension* shall not amount to *more* than three years from the ceasing of the disability, or the death of the person affected thereby, see illus. (b), but it does not cut down any period of limitation to which he might be entitled, assuming him not to have been under disability when the cause of action arose, if the portion still unexpired be more than three years, see illus. (c), and such unexpired portion is still available; *Ramaniya v. Venkatavaradhaiyangar*, 4 Mad. H. O. Rep. 54; *Luchman Singh v. Kazim Ali*, 5 W. R. 219; *Radhamohun v. Mohesh*, 7 W. R. 3; *Sree Pershad v. Rajgooroo*, 10 W. R. 44. The Court in the Madras and in the third Calcutta cases, which were



under Sect. 11, Act XIV of 1859, seem to have ruled rather too widely that the effect of that section was to add to the period of limitation three years from the ceasing of disability in all cases, whereas the provisions of that section on this point are that it shall *not add more* than three years, which is the case in the present section. The opinions of the Courts on this point were, however, only *obita dicta*, as they were not necessary for the decision of the cases. The provisions of this section do not *extend* to three years any period of limitation which is less than three years; *Subramanya v. Siva Subramanya*, *I. L. R.* 17 *Mad.* 316. Where a person who has lately attained his majority makes an application complaining of obstruction of delivery of possession of property under a decree, which obstruction took place whilst he was a minor, such application must, under this section and Art. 167, be made within 30 days of his attaining his majority; *Vinayekrao v. Devrao*, *I. L. R.* 11 *Bomb.* 473.

The suitor is saved from the effect of limitation during the whole time he is under any number of disabilities, so long as no time elapses between the cessation of one and the commencement of another, but if there be any interval, however short, time begins to run.

If disability to sue continues up to the person's death, then his representative has the right to count the time for limitation from the date of his death, and has the same privileges as the deceased, if, *at the date of the death of the deceased*, he also is under any disability, and in his case the first two clauses must be read as if they contained the words "at the date of the death of the person whom he represents" instead of "at the time from which the period of limitation is to be reckoned."

The person entitled to institute a suit must be in existence as entitled and under disability at the time from which the period of limitation commences; therefore a minor, on coming of age, cannot avail himself of this section in respect of a right of suit which came into existence before his birth; *Siddhessur v. Sham Chand*, 23 *W. R.* 285; nor in respect of a right against which time had begun to run before he became entitled to it; *Vira Pillay v. Muruga Muttayam*

2 *Mad. H. C. Rep.* 340; *Nosheram v. Shushee*, 5 *W. R.* 169; *Mukootnath v. Jugvant*, 3 *Agra*, 389; *Taruck v. Doorgachurn*, 20 *W. R.* 2; *Mohabat v. Ali Mahomed*, 12 *W. R.* 1; 2 *B. L. R. App.* 80; *Abhaya v. Hari*, 10 *W. R.* 285; *Sookh Moyee v. Raghubendro*, 24 *W. R.* 7; as a decree obtained by the minor's father before his death, the father being under no disability; *Anundi v. Thakur Panday*, 4 *W. R. Misc.* 21; 1 *Ind. Jur. N. S.* 31. *Quere*, whether the limitation of twelve years from the date of the decree provided by Sect. 230, *C. P. C.*, can be extended by any disability of the person entitled which may arise after the date of the decree; *Lolit Mohun v. Janoky Nath*, 1. *L. R.* 20 *Calc.* 714. A registered bond in favour of A fell due in 1872. A died in 1875, leaving B, his minor son. In 1877 the obligors made an acknowledgment of their liability. B came of age in 1885, and sued on the bond in 1887. It was held that he could take advantage of his minority at the time the acknowledgment was given, and that the suit consequently was not barred; *Venkataramayyar v. Kothandaramayyar*, 1. *L. R.* 13 *Mad.* 135. In case of a representative under disability it must be proved that the original person was entitled to claim the benefit of this section, and also that the representative is so entitled.

Infancy, &c., are personal privileges, and no one else but the persons entitled to those privileges can take advantage of them; *Mahomed Arsad v. Yakooob Ally*, 15 *B. L. R.* 357; *S. C.* 23 *W. R.* 181; except some one who is by law entitled to represent such persons, therefore, a purchaser or assignee from a minor is bound by the ordinary law of limitation; *Mahomed Arsad v. Yakooob Ally*, *ubi sup.*; *Rudra Kant v. Nobo Kishore*, 1. *L. R.* 9 *Calc.* 663. This section, further, only applies to cases where there is but one person entitled to bring a suit or make an application, and he is a minor or under some other disability, or in which all the persons jointly entitled are under disability; it does not seem to be intended to apply to cases in which the minor's interest can be protected by those jointly interested with him; *Seshan v. Rajagopala*, 1. *L. R.* 13 *Mad.* 236, following *Perry v. Jackson*, 4 *T. R.* 519; *Narayanan v. Damodaran*, 1. *L. R.* 17 *Mad.* 189.

The provisions of this section apply during the continuance of the disability, and do not merely come into force on the disability ceasing; consequently, if, while the disability lasts, the ordinary time prescribed for limitation runs out, the person under disability can subsequently, and while still under disability, bring a suit or make an application in respect of his claim by his guardian, or next friend; *Phoolbas v. Lalla Jogeshur*, *I. L. R. 1 Calc. 226*, in the Privy Council, approving *Ram Ohundra v. Umbakra Dossia*, *7 W. R. 161*; *Ram Ghose v. Greedhur Ghose*, *14 W. R. 429*; and *Sreemuttee Suffuroonissa v. Noovul Hossein*, *17 W. R. 419*; see also *Jugmohun Mahto v. Luckmeshur Singh*, *I. L. B. 10 Calc. 756*; *Baldeo Singh v. Kishan Lall*, *I. L. R. 9 All. 411*; *Ganda v. Jawand Singh*, *Panj. Rec. No. 112 of 1881*; *Lolit Mohun v. Janokoy Nath*, *I. L. R. 20 Calc. 714*.

The fact that a minor is for a time represented by a guardian does not remove the disability of the minor and prevent him, on his attaining his majority, claiming the benefit of this section; *Huro Soonduree, v. Anundnath Roy*, *3 W. R. 8*; *Mahipatray v. Nensuk Anundray*, *4 Bomb. H. C. Rep. 199*; *Anantharama v. Karuppanam*, *I. L. R. 4 Mad. 119*; *Khodabux v. Budree Narain*, *I. L. R. 7 Calc. 137*; *Jaggiwan v. Hasan Abraham*, *I. L. B. 7 Bomb. 179*; *Mon Mohun v. Gunga Soondery*, *I. L. B. 9 Calc. 181*; *S. C. 11 C. L. B. 34*; *Moro v. Visaji*, *I. L. R. 16 Bomb. 536*; *Lolit Mohun v. Janokoy Nath*, *I. L. R. 20 Calc. 714*. So, too, if insanity be the disability it makes no difference that a committee of the lunatic's estate has been appointed; *Troup v. East India Co.*, *7 Moore, I. A. 104*.

*Minor*.—Under Act IX of 1871, Sect. 3, “minor” was defined as a person who has not completed his age of eighteen years, and under that Act it was ruled in *Rainey v. Nobo Coomar*, *5 C. L. R. 543*, that no person, whatever his domicile might be, was protected from the operation of the Act beyond the age of eighteen, but that definition has been repealed, and the present Act contains no definition of minor. Consequently, whether a person is a minor or not, must be decided by the law of the party in each case; *Hari Mahadaji v. Vashuday*, *2 Bomb. H. C. Rep. 344*; *i. e.*, as regards persons under guardianship of a Court

of Justice or Court of Wards and persons *domiciled* in British India by Act IX of 1875, and as regards other persons by the law of the domicile. The High Court of Bombay has expressed an opinion that, wherever the property or person of a minor is in the hands of a guardian at the age of eighteen, the age of majority is extended to twenty-one, and has ruled that if there has been an *appointment* of a guardian to the person of a minor, that is sufficient to extend the age of majority; *Yeknath v. Warubai*, *I. L. R.* 13 *Bomb.* 289, 290. The High Court at Calcutta has gone rather further and held that where a guardian has been appointed to the person or property of a minor, although no certificate has been issued, the minor remains so until the age of twenty-one; *Girish Chunder v. Abdul Selam*, *I. L. R.* 14 *Calc.* 55. Act VIII of 1890, Sect. 52, now provides that minors to whom guardians *ad litem* have been appointed under Chap. XXXI, C. P. C., do not by such appointment have their minority extended to twenty-one.

A stated that he was born in 1848, that his great-grand-father was according to the tradition of the family a European (but of what nationality he did not know), residing at Madras, and his great-grand-mother a native, but he did not know whether they were married, or who his grand-mother was, or whether she was married to his grand-father, that his father married a lady bearing an English name and that he and all his family were Christians, that he was born in Calcutta, and knew no relatives in Europe. It was held that he was the legitimate descendant of a European British subject, and that his age of majority was 21 years; *Rollo v. Smith*, 1 *Ben. L. R. O. C.* 10.

The only disabilities under this section are minority, insanity, and idiotcy, nothing else constitutes a disability to sue. The fact that an adopted son on attaining his majority had to sue to establish his adoption is not a disability, and he cannot be allowed the time which was occupied in establishing his rights. Although his rights were disputed he still could have sued in the meantime to recover property which devolved on him in virtue of his adoption; *Muddo Mohun v. Nund Kishore*, 5 *W. R.* 295; so, too, the pendency of an appeal against a decree establishing the right of

a person does not put that person under a legal disability to bring a suit in virtue of that right against a third person; *Perhlad Sein v. Budho Singh*, 12 *W. R. P. C.* 6. See also *Sankaran v. Periasami*, *I. L. R.* 13 *Mad.* p. 469, to the same effect as the two preceding cases, which, however, do not seem to have been brought to the notice of the Court. A plaintiff suing under Ben. Act. VIII of 1869, for arrears of rent, is not entitled to the benefit of this section in respect of minority; *Girija Nath v. Patani*, *I. L. R.* 17 *Calc.* 263.

**Sect. 8. Disability of one joint creditor.**—When one of several joint creditors or claimants is under any such disability, and when a discharge can be given without the concurrence of such person, time will run against them all; but where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others.

*Illustrations.*

- (a) A incurs a debt to a firm of which B, C, and D are partners. B is insane and C is a minor. D can give a discharge of the debt without the concurrence of B and C. Time runs against B, C, and D.
- (b) A incurs a debt to a firm of which E, F, and G are partners. E and F are insane, and G is a minor. Time will not run against any of them until either E or F becomes sane, or G attains majority.

*Notes.*

This section applies only to creditors, *i.e.*, plaintiffs, and claimants, those who, though not filing a suit, are in the position of plaintiffs, it does not apparently include appellants, nor applicants whose application is not to assert a claim. The High Court at Calcutta has ruled the latter part of this section applies only to cases where *all* the joint creditors or claimants are under a legal disability; *Anando v. Anando*, *I. L. R.* 14 *Calc.* at p. 53;

but, if the whole section be read, it will be seen that it applies to cases in which some may be under disability and some not, but no discharge can be given, and then limitation runs from the time when some one or more of them can give a discharge. Where a right to sue was vested jointly in B and a minor the administration of whose estate was in the hands of administrators appointed by the Court, it was held that as B could not have given a discharge without the concurrence of the administrators this section applied to all items of the claim which arose during the continuance of such disability; *Balcrishna v. Naro*, P. J. 1888, p. 141.

*Hindu joint family.*—The manager of a joint Hindu family, of which S was a minor member, lent money on behalf of the family to K. The time limited by law for a suit for such money was three years from the date of the loan. After attaining his majority, S sued K for this money, and as the period limited by law for such suit had expired, relied on the provisions of this section. During the period of S's disability there was more than one member of the joint family who was of full age and could have given a discharge to K without the concurrence of S. It was, therefore, held that the suit of S was barred; *Surju Prasad v. Khwahish Ali*, I. L. R. 4 All. 512; followed in *Vignesvara v. Bapayya*, I. L. R. 16 Mad. 437. This section will probably at some future time require careful consideration, especially with regard to the position of minor members of joint Hindu families, because, although the question is not the same as whether a manager or member of a joint family was justified in taking a loan, or making a sale, on account of the family, yet somewhat similar questions may arise under its provisions. For instance, in the case cited, although the male members of the family of full age might, as a matter of *fact*, have given a release to the debtor, could they have sued him for the money and given him a *valid legal* release without joining the minor members as plaintiffs? It has been ruled that, although a joint family may constitute any one of their members their agent so as to bind them by his acts, yet it does not follow that he will be able to sue on the contracts that he has made on their behalf in his own name,

but must ordinarily join all the members; *Ramsebuk v. Ramlall Koondoo*, I. L. R. 6 Calc. 826; approved of in *Kalidas Kevaldas v. Nathu Bhagwan*, I. L. R. 6 Bomb. at p. 219. The defendant is always entitled, if he takes the objection at an early stage to have all the members of the family placed upon the record, to insure him against the possibility of the plaintiff acting without authority; *Hari Gopal v. Gokaldas*, I. L. R. 12 Bomb. 158.

Where a bond is taken in the name of a minor member of an undivided family, the fact, that he has an undivided brother of full age will not cause the first clause of this section to come into operation, as the brother cannot give a valid discharge for the debt; *Yeknath v. Waman*, I. L. R. 10 Bomb. 241; *secus*, see *Ahamuddin v. Grish Chunder*, I. L. R. 4 Calc. 350, a case of co-sharers. In the case of a decree against judgment-debtors as wrong-doers, one plaintiff cannot give a discharge binding upon the others; *Anando v. Anando*, I. L. R. 14 Calc. at p. 54. In Madras it has been held that this section does not apply at all to joint execution-creditors, on the ground that no joint execution-creditor can of himself give a discharge, but must do it through the Court; it only applies to cases in which the act of the adult joint owner is *per se* a discharge; *Sesha v. Rajagopala*, I. L. R. 13 Mad. 236; see also *Narayanan v. Damodaran*, I. L. R. 17 Mad. 189. One of a number of persons who, on the death of a lessor, a Muhammadan, became entitled to his rights under the lease, can give a discharge for the rent falling due under the lease; *Darulat Ram v. Sayad Abdul*, Panj. Rec. No. 60 of 1893.

**Sect. 9.** *Continuous running of time.*—When once time has begun to run, no subsequent disability or inability to sue stops it :

Provided that where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues.

*Notes.*

This section does not apply to applications, but only to suits ; *Behari Lal v. Baness*, *Panj. Rec.* No. 109 of 1889 ; but see notes to Sect. 2 on "right to sue."

The only disabilities provided for by this Act are those mentioned in Sect. 7, the notes to which should be referred to. The Legislature has caused some confusion by introducing into this section the word "inability," there being no "inability" to sue mentioned in any portion of the Act except the "disabilities" referred to in Sect. 7. Consequently, the inability referred to must also be held to be a personal inability affecting the plaintiff himself, and having reference to his condition, state or position, and not to the circumstances of the person against whom he is entitled to bring a suit ; *per Birdwood, J.*, in *Hanmantram v. Bowles*, *I. L. R.* 8 *Bomb.* 561 at p. 569. This section, therefore, does not in any way qualify Sect. 13, so as to prevent its operation in cases in which time has begun to run before the defendant left British India ; *Beake v. Davis*, *I. L. R.* 4 *All.* 530 ; and *Hanmantram v. Bowles*, *ubi sup.* ; dissenting from the judgment of *Bayley, J.*, in *Narronji v. Mugniram*, *I. L. R.* 6 *Bomb.* 103.

If there be no disability at the time fixed for the commencement of the period of limitation (under the old Acts, at the time the cause of action arose) a subsequent disability will not stop time running ; *Gobind Coomar v. Haro Chandra*, 7 *W. R.* 134, and if the disability of the person entitled cease, and then the right devolves upon another, the disability of that person at the time of devolution will not stop time running ; *Sreemutty v. Hurrykristo*, 10 *W. R.* 285, in which case the plaintiff's husband had had a full year between attaining his majority and his death to sue, and the plaintiff at the time of his death was a minor. See also the cases of *Siddeshur v. Sham Chand*, and *Vira Pillay v. Muruga Muttayam*, *ante*, p. 36. Where an acknowledgment of a debt is given before time has run out, a new period of limitation is created, and if the person to whom the acknowledgment is given is a minor, time will not begin to run against him in respect of the new period till he comes of age ; *Venkataramayyar v. Kothandaramayyar*, *I. L. R.* 13 *Mad.* 135.



This rule, that when time has once begun to run it cannot be stopped, is dependent on the continuance in force of the enactment under which time has been running. If the statutory pressure be removed by the total repeal of the Act, there is nothing to cause time to run against the creditor, unless the Legislature re-enact the old, or substitute some new, rule of limitation; *Abdul Karim v. Manji Hansraj*, I. L. R. 1 Bomb. 303. This section can only apply to cases in which there is a person in whose favour limitation is running; *Agency Co. v. Short*, 13 App. Ca. p. 799.

The second clause is an enactment of the English law, see *Seagram v. Knight*, I. L. R. 2 Ch. App. 632, and the cases cited there; *Needham's case*, 8 Rep. 135a; and *Wankford v. Wankford*, 1 Salk. 299. The remedy in this case is suspended by the act of law, but the result is different where the suspension is by the voluntary act of the testator, by making the debtor his executor, in that case the remedy having been suspended by the voluntary act of the party, the right of action, is *at law*, for ever gone and discharged; in equity, however, the debtor-executor is a trustee of his debt for legatees, including a residuary legatee, and next-of-kin; see Williams on Executors, Part III, Book III, Sect. 2. Still this section does not prevent time running in his favour while he is executor. The only section which would prevent time running in his favour would be Sect. 10, if, indeed, he can be brought under its provisions. No provision for such a case is to be found in Act X of 1865 or Act V of 1881.

**Sect. 10.** *Suits against express trustees to follow trust property.*—Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property, shall be barred by any length of time.

*Notes.*

This section differs from Act XIV of 1859, Sect. 2, and from Act IX of 1871, Sect. 10. The former provided for suits against

a trustee, &c., for the purpose of following the *specific property* which was the subject of *the trust*, the present section for the purpose of following *property* vested in a trustee for any *specific purpose*. The section of Act XIV of 1859 also contained two clauses which now appear as Arts. 98 and 100 in the second schedule to the present Act. Act IX of 1871 provided that purchasers for value *in good faith* from a trustee were not his representatives. The present section leaves out the words “in good faith” and extends protection to all assignees for valuable consideration.

Two circumstances must concur to bring this section into operation:—1, property must have vested in some person as a trustee for a specific purpose; 2, the suit must be brought to follow the trust property.

*Vesting* implies that some one has an estate in the subject-matter of the alleged trust, not merely that he has power to charge it, or direct how it should be disposed of; *Dickenson v. Teasdale*, 1 DeG. J. & S. 52; *Coverdale v. Charlton*, 4X Q. B. D. 120; consequently, directors of a company are not persons in whom the property of the company vests under this section; *Kathiawar Trading Co. v. Virchand*, I. L. R. 18 Bomb. 119. The liquidator of a company is not strictly speaking a trustee for creditors or contributories of a company in liquidation, but an agent of the company; *Knowles v. Scott* [1891], 1 Ch. 717. The particular words of this section, “in whom property *has become vested* in trust for a specific purpose” render inapplicable many of the English decisions as to directors and others being express trustees of money over which they have control.

*Trust for specific purpose. Express Trust.*—This section is substantially the same as 3 and 4 Wm. 4, c. 27, s. 25, and 36 and 37 Vict. c. 66, s. 25, sub-s. 2, the main difference being, that what is in the Indian Act called a trust for specific purpose is in the English Acts called an express trust, and *Garth, C. J.*, in *Kherodemoney. v. Doorgamoney*, I. L. R. 4 Calc. 465, 3 C. L. R. 315, ruled that this section applied “where a trust has been created expressly for some specific purpose or object, and property has become vested in a trustee upon such trust,” thus shewing that in his mind “express trust” and “trust for

a specific purpose" were synonymous. In the same case *Markby*, J., at p. 470, says, "by specific purpose must be meant a purpose which has been specified by the person who has created the trust." *Markby*, J., however, seemed to think on the authority of Lewin on Trusts, note on p. 86, 5th edition (p. 98, 7th edition), that in the English statute "express trust" included implied and constructive trusts, but that is not the case, for in *Cunningham v. Foot*, 4 App. Ca. p. 992, Lord *O'Hagan* thus defines an express trust: "Such a trust must be created *eo nomine*, or by the gift to the trustee of property not merely charged with or subject to a payment, but so dedicated by clear and distinct words as to fix on the trustee a fiduciary obligation to apply it for that special purpose"; and *Cairns*, L. C., on the same case at p. 984, sums up his definition of an express trust as "a trust arising upon the words of the instrument itself." In *Dawkins v. Penrhyn*, 4 App. Ca. p. 51, the same learned Judges, at pp. 61 and 68, lay down the same law in other words. See, also, *Dooby v. Watson*, 39 Ch. D. at p. 186. So, too, in Lewin on Trusts, 7th edition, p. 749, it is distinctly laid down that "trusts arising by the construction of a Court of equity from the acts of parties, or to be made out by circumstances, or to be proved by evidence, will not be saved by the clause relating to express trusts." Accordingly the Courts in England have refused to apply the statute as between a surviving partner and the executors of his deceased partner; *Knox v. Gye*, L. R. 5 H. L. 656; to a bribe received by a director of a public company; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319; to a mortgage in the form of a trust for sale; *Locking v. Parker*, L. R. 8 Ch. 30; *Johnson v. Mounsey*, 11 Ch. D. 284; *Warner v. Jacob*, 20 Ch. D. 220; to a covenant in pursuance of an anti-nuptial agreement to settle a certain sum of money; *Stone v. Stone*, L. R. 5 Ch. 74, to a direction to pay the rents of a certain property to a wife for life; *Cunningham v. Foot*, 3 App. Ca. 974; to a devise to a son "in the fullest trust and confidence" that he would not bar an estate tail; *Dawkins v. Penrhyn*, 4 App. Ca. 51; to the relation of a mortgagee to his mortgagor in respect of any surplus money realized on the sale of the mortgaged property; *Banner v. Berridge*, 18 Ch. D. 254; the same has also been ruled in India;

*Baboo Lall v. Jamal Ally*, 9 W. R. 187 (unless there is an express trust created in the mortgage-deed in respect of any surplus; *Locking v. Parker*, L. R. 8 Ch. 30); to the relation between a mortgagee whose mortgage has been satisfied and his mortgagor; *Sands v. Thompson*, 22 Ch. D. 614; *Baboo Lall v. Jamal Ally*, 9 W. R. 187. See, however, Transfer of Property Act, 1882, Sect. 69, which would seem to make a mortgagee a trustee for a specific purpose in respect of surplus sale money. An executor, who has assented to a legacy, does not thereby become a trustee so as to be unable to avail himself of the statutes of limitation; *Jacobs v. Hind*, L. R. W. N. 1889, p. 74. Trustees of a void charitable deed are not express trustees for the representatives of the grantor claiming against the deed; *Churcher v. Martin*, 42 Ch. D. 312. For further illustrations of what is and what is not an express trust, see *In re Davis*, [1891] 3 Ch. 119; *In re Barker*, [1892] 2 Ch. 491.

In the following cases the trusts were all expressly created in written instruments and the statute was held to apply; *Sturgis v. Morse*, 3 DeG. and J. 1; *Lewis v. Duncombe*, 29 Beav. 175; *Burdick v. Garrick*, L. R. 5 Ch. 233; *Butler v. Carter*, L. R. 5 Eq. 276; *Thompson v. Eastwood*, 2 App. Ca. 215; *Mutlow v. Bigg*, L. R. 18 Eq. 246 (reversed on another point in 1 Ch. D. 385); *Stone v. Stone*, L. R. 5 Ch. 74. The instrument must create a trust, but it is not necessary that it should specify all or any of the *cestuis qui trustent*. If, therefore, land be devised in trust to receive the rents, and pay thereout certain annuities, the surplus rent results to the heir-at-law upon the face of the instrument, and there is an express trust in his favour, so that limitation does not run against him; *Salter v. Cavanagh*, 1 D. & Wal. 668, followed in *Patrick v. Simpson*, 24 Q. B. D. 128.

Of course these are cases in which there were written instruments, but there may be places where, or property in respect of which, a written document is not necessary to create an express trust; in such cases the same principles would apply and the creation of a trust must be express and for a specific purpose. The remarks of Kay, J., in *Banner v. Berridge*, 18 Ch. D. at pp. 263-265, and the cases of *Burdick v. Garrick*, and *Foley v. Hill*,

commented on by him shew that even under English law there may be trusts for a specific purpose, without any document in writing having been made, but that the general principles by which the existence of a trust in such case is to be determined are the same as those applicable to trusts under written documents although the mode of proof may differ. For the case of a trust for the payment of debts created *vivâ voce*, see *Suddasook v. Ramchunder*, I. L. R. 17 Calc. 620; and for a trust of a woman's *stridhan*, *Sethu v. Krishna*, I. L. R. 14 Mad. 61.

The case, however, referred to in the passage quoted from *Foley v. Hill*, is a case of deposit which is specially provided for by Art. 145 of the second schedule.

Looking now to the other decisions of the Courts in India we find that one of the most important cases is that of *Lallubhai v. Mankuvarbai*, I. L. R. 2 Bomb. 388, wherein, at pp. 414, 415, it was held that an executor, who by a will is made an express trustee for certain purposes, was, as to the residue, a trustee within the scope of Act XIV of 1859, Sect. 2, in which, however, the words "specific purpose," do not appear, but which runs as follows, "no suit against a trustee \* \* for the purpose of following \* \* the specific property which is the subject of the trust, shall be barred." This important distinction which was pointed out by Garth, C. J., in *Greender Chunder v. Mackintosh*, I. L. R. 4 Calc. p. 924, prevents, it is submitted, this case being any authority in the interpretation of Sect. 10 of Act IX of 1871 or Act XV of 1877. In the case of *Greender Chunder v. Mackintosh*, I. L. R. 4 Calc. 897; 4 C. L. R. 193; under Act IX of 1871, Garth, C. J., and White, J., after considering the case of *Lullubhai Bapubhai v. Mankuvarbhai*, followed the previous decision in *Kherodemoney v. Doorgamoney*. The point as to what constitutes an express trust does not seem to have arisen in Bombay under Acts IX of 1871 and XV of 1877, for in the case of *Thakersey Dewraj v. Hurbhum Nursey*, I. L. R. 8 Bomb. 432, decided by Scott, J., there was a trust deed. There are, however, two cases which seem to indicate what would now be the decision in Bombay if the point arose again. In *Hurihar v. Shideshvar*, P. J. 1877, p. 195,

*Westropp*, C. J., and *Melville*, J., held that where, under the terms of a partition decree, one member of a family, becomes a trustee of the shares of the other members of the family, the case was governed by Sect. 10 of Act IX of 1871, but where no trust is created, he is simply an agent for them; *Vyankatray v. Anpurnabai*, *ib.* p. 302. The Calcutta cases, cited above, were subsequently followed by *Parsons* J., in *Nanlal v. Harlochand*, *I. L. R.* 14 *Bomb.* 476.

The two Calcutta cases before cited have, however, been followed in principle, in Calcutta, by *Wilson* and *Cunningham*, JJ., in *Anund Moyee v. Girish Chunder*, *I. L. R.* 7 *Calc.* 772, at p. 775; and have been approved and acted on in *Hemangini v. Nobin Chand*, *I. L. R.* 8 *Calc.* 788; 11 *C. L. R.* 370; and in Madras, in the case of *Arunachala v. Ramasamy*, *I. L. R.* 6 *Mad.* 402. In Allahabad, in the case of *Barkat v. Daulat*, *I. L. R.* 4 *All.* 187, *Oldfield*, and *Tyrrell*, JJ., have held that, to create an express trust within the meaning of this section, it must appear, either from express words, or clearly from the facts, that the rightful owner of property has entrusted the property to the person alleged to be a trustee for the discharge of a particular obligation; and further, that a resulting trust is not a trust for a specific purpose under this section; *Muhammad Habibulla v. Safdar Hussein*, *I. L. R.* 7 *All.* 25; *Manickavelu v. Arbutnot*, *I. L. R.* 4 *Mad.* 404. Where a will gives no directions as to the disposition of residue, the executors are not trustees of the residue for a specific purpose; *Nanlal v. Harlochand* *I. L. R.* 14 *Bomb.* 476. Executors cannot be deprived of the benefit of the statute except by shewing that they are express as distinguished from implied trustees; *Evans v. Moore* [1890], 3 *Ch.* 119.

In order, therefore, in this country to bring a case under this section there must be evidence, either documentary or oral, that a trust has been created for some specific purpose, and that property has become vested in a trustee for the purpose of carrying that purpose into effect.

Debts are by law a charge upon the estate of a deceased person and his executor is bound to pay them out of the estate, and a

mere direction in a will that the executor should pay the testator's debts out of his property does not create a trust for a specific purpose so as to prevent limitation running; *Gopalnarain v. Muddomutty*, 14 *Ben. L. R.* 21, at pp. 45, 46; but a trust or charge in a will on specific property for that purpose, if it take effect and has a legal operation, will do so; *ib.*; see, also, *In re Hepburn*, 14 *Q. B. D.* at p. 399.

A gift by will of a specific share of rents and profits to be paid to the legatee by the executor is a trust for an express purpose; *Hemangini v. Nobin Chand*, *I. L. R.* 8 *Calc.* 801, 802; see also *Mannox v. Greener*, *L. R.* 14 *Eq.* 456.

The *dharmakarta* of a temple, who has charge of the funds of the temple for the purpose of applying them to temple purposes, is a person in whom funds have become vested for a specific purpose, and any portion of such funds which have come into his hands and been misappropriated by him may be followed without limit as to time; *Sethu v. Subramanya*, *I. L. R.* 11 *Mad.* 274. The manager of a *Saranjam* may be regarded as holding the profits on a specific trust; *Narayan v. Vasudev*, *P. J.* 1890, p. 256.

Where shares were allotted to S on the understanding that a portion of such shares should be transferred to and registered in the names of the plaintiffs on their paying S for them, which they did; it was held that this transaction was not a trust for a specific purpose, nor a trust at all, but an agreement, to the specific performance of which the plaintiffs were entitled; *Ahmed Mahomed v. Adjein Dooply*, *I. L. R.* 2 *Calc.* 323.

Where a creditor's trust deed contained no provision for re-distribution of unclaimed dividends, and a creditor, a party to the deed, brought a suit for the administration and distribution of funds in the defendant's hands representing dividends allotted to other creditors, and unclaimed for forty years; it was held that the defendants as between themselves and the plaintiff were not trustees for a specific purpose of such funds, and that this section did not apply; *Manickavelu v. Arbuthnot*, *I. L. R.* 11 *Mad.* 404.

A statement in a *wajib-ul-arz*, made after certain persons had absconded, leaving their property in the possession of a co-sharer, that the absconders should have their property back on their return, does not amount to the declaration of a trust for a specific purpose; *Piarey Lall v. Saliga*, I. L. R. 2 All. 394; for similar cases, see *Kamul v. Batul*, I. L. R. 2 All. 460; and *Barkat v. Daulat*, I. L. R. 4 All. 187.

The surplus sale proceeds of property sold for arrears of Government revenue remaining in the hands of the Collector are not vested in him, and consequently this section does not apply to such a case; *Secretary of State v. Fazal Ali*, I. L. R. 18 Calc. 234.

A *benami* transaction does not create the relation of trustee and cestui qui trust; *Uma Sundari v. Dwarkanath*, 2 Ben. L. R. A. C. 284; 11 W. R. 72.

R sued his father and brother A for a partition of the family property, and obtained a decree, whereby, *inter alia*, he was declared to be entitled to receive one-third of a certain debt due to the family, which was subsequently received by the father from the debtor who had no notice of the decree. The father died and his estate came into the possession of A. R sued A for the amount of the one-third, and it was held that the father did not hold the money received by him in trust for a specific purpose; *Arnachella v. Ramasamy*, I. L. R. 6 Mad. 412.

There is only one case in which any of the Courts in India have acted on a different principle, and that was what is called a hard case, and the same Court has subsequently agreed in principle with all the others. B and D, father and son, were jointly entitled to a moiety of an estate, and B's brother E and his son K were entitled to the other moiety, B and D were transported for life. Thirty years afterwards (B having died in the meantime) D returned, and asserted his right to a moiety of the estate against a person who derived his title from E and K who had taken possession of the whole. It was held that, looking to all the circumstances of the case, E and K had taken possession subject to a constructive trust in favour of B and D, and that D was accordingly entitled to assert his right without reference to limitation; *Durga Persad v. Asa*



*Ram*, I. L. R. 2 All. 361. This case was not approved of by *Stuart C.J.*, in *Hait Ram v. Durga Persad*, I. L. R. 5 All. 608, and in the same case *Straight*, J., regretted that he had not qualified his remarks in the former case by confining them to the particular circumstances of that case.

A suit against the agent of the representative of a deceased person, against whom a decree had been passed for the conversion of certain goods, to recover from him the proceeds of such goods which were in his hands as such agent does not fall under this section, but under Art. 120; *Gurudas v. Ram Narain*, 11 I. A. 59; *S. C.*, I. L. R. 10 Calc. 860; followed in *Muhammad Habibulla v. Safdar Hussain*, I. L. R. 7 All. 25.

*Suit must be to follow property.*—A suit to come under this section must be one to follow in specie the property on which a trust has been impressed, and to recover it for the benefit of the trust; *Bulwant Rao v. Puran Mal*, 10 I. A. 90; *S. C.*, I. L. R. 6 All. 1, and 13 C. L. R. 39; *Saroda Persad v. Brojo Nath*, I. L. R. 5 Calc. 910; not merely to have an account of the defendant's stewardship and to be paid any balance which may be found to be in his hands; *Saroda Persad v. Brojo Nath*, *ubi sup.*; *Shapurji Nowroji v. Bhikaiji*, I. L. R. 10 Bomb. 242; nor to enforce the plaintiff's personal right to the management or possession of the property against one who does not deny the trust; *Bulwant Rao v. Puran Mal*, *ubi sup.*; *Karimshah v. Nattan Bivi*, I. L. R. 7 Mad. 417; *Giyana v. Kandasami*, I. L. R. 10 Mad. at p. 477; but if a suit be for the purpose of removing the defendants from the trusteeship and appointing the plaintiff and also to recover property improperly dealt with by the defendants in breach of the trust, it will come under this section; *Sreenath Ghose v. Radha Nath*, 12 C. L. R. 370. A suit to recover money for the plaintiff's own use, on failure of the trusts impressed on the property does not fall under this section; *Jasoda v. Parmanand*, I. L. R. 16 All. 256.

A suit against trustees for the purpose of charging certain property with the trusts declared by the author of the trust in respect of that property, is a suit to follow property; *Hurre Coomari v. Tarini Churn*, I. L. R. 8 Calc. 766.

A suit by trustees of a temple to recover the temple from a *dharmakata*, who had been dismissed by them, but who continued in possession of the temple, is a suit to follow property; *Virasami v. Subba Rau*, I. L. R. 6 Mad. 54.

Where the administratrix of the estate of a deceased person settled certain property belonging to the estate, and subsequently in connection with the co-owners of a portion of that property re-settled it in a different manner, it was held that a suit to recover that portion of the property which belonged to the estate of the deceased for the purposes of the original trust was a suit to follow trust property; *Advocate General v. Bai Punjabai*, I. L. R. 18 Bomb. p. 562.

It is not necessary that the suit should be to follow the original trust property only, for, if the trust estate has been tortiously disposed of by the trustee, the *cestui que trust* may attach and follow the property that has been substituted in the place of the trust property, so long as the metamorphosis can be traced; *Taylor v. Plumer*, 3 M. and S. 574. For the various cases in, and the extent to, which substituted property can be followed, see Lewin on Trusts, Chap. XXIX. Sect. 2.

A plaintiff who does not seek to enforce the trusts of a will, but to have the dispositions declared invalid, is not a person seeking to enforce a specific trust; *Hemangini*; v. *Nobin Chand*, I. L. R. 8 Calc. 788, at p. 800. Where there had been a suit to remove a person from the position of superintendent of certain trust property, which had been settled by a compromise, a suit by third parties, interested in the property, to set aside the compromise as fraudulent does not come under this section; *Muhammad Balsh v. Muhammad Ali*, I. L. R. 5 All. 294.

There seems to be no special article for suits against a trustee to make good a loss occasioned by a breach of trust, as, for instance by lending money on property not authorised by the trust, unless such a suit can be regarded as being a suit to follow property in the hands of the trustee. Article 98 provides a limitation as against the estate of a deceased trustee, which seems to

indicate that in case of a living trustee there is no limitation. If Sect. 10 is not applicable then Art. 120 will apply.

*Trustee.* A trustee properly so called must have property committed to his charge. There must be a person or persons for whom he is a trustee, and there must be property vested in him for which he is a trustee for such person or persons, and though the property need not be *legally* vested in him, he must have the right to call for its transfer to him; *Barney v. Barney* [1892], 2 Ch. 265. A liquidator is not a trustee for contributories or creditors; *Knowles v. Scott* [1891], 1 Ch. 717; nor are directors of a company, as such, *Kathiawar Trading Co. v. Virchand*, I. L. R. 18 Bomb. 119.

A man may accept the office of trustee by signing the trust deed; *Buckeridge v. Glasse*, 1 Cr. and Ph. 131, 134; by an express declaration of his assent; *Doe v. Harris*, 16 M. and W. 517; or by acting in the execution of the duties of the trust; and if, with notice of his appointment as trustee, he does not disclaim, although he may do nothing, he is still bound as a trustee; *In re Uniacke*, 1 Jones and L. 1; *In re Newham*, ib. 34; *Wise v. Wise*, 2 ib. 403, 412. Where a person has assumed, either with or without the consent of the parties interested, to act as a trustee of money or other property, i.e., to act in a fiduciary relation with regard to it, and has been in possession of such money, a Court of Equity will impose on him all the liabilities of an express trustee without regard to lapse of time; *Soar v. Ashwell* [1893], 2 Q. B. 390; so too where a man has assisted a nominated trustee in a fraudulent and dishonest disposition of the trust property; *ib.*, following *Burdick v. Garrick*, L. R. 5 Ch. 233; and *Barnes v. Addy*, L. R. 9 Ch. 244. The latter ruling, however, would probably not be followed here unless the property had become vested in or possessed by the interloper.

If a testator appoints persons to be executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that residuary estate, although there is no express devise of it to them, and they will become express trustees; *Treepoora v. Debendronath*, I. L. R. 2 Cal. 45.

Government, by directing the Court of Wards to take charge of an estate, does not constitute itself a trustee for the rightful owner; *Viziaranarayn v. Secretary of State*, *I. L. R.* 5 *Mad.* 91, affirmed on appeal to *P. C.*, *I. L. R.* 8 *Mad.* 525; *S. C.* 12 *I. A.* 120.

The wrongful invasion or continuance in possession of a stranger does not make him a constructive trustee, unless he has been admitted into possession by a trustee; *ib.*, *I. L. R.* 5 *Mad.* 91.

*Purchasers.*—A question will some day have to be decided as to whether the present section has or has not changed the English law; it would seem as if it had. Under that law a purchaser of a trust estate, at its full value, *with notice of the trust*, is bound to the same extent and in same manner as the person of whom he purchased, for knowing another's right to the property, he throws away his money voluntarily, and of his own free will, and limitation would not run against him any more than against the trustee. For a full discussion of this point, see Lewin on Trusts, Chap. XXIX, Sect. 1. Act IX of 1871, Sect. 10, recognized this doctrine, in part, at any rate, by providing that "a purchaser *in good faith* for value from a trustee is not his representative within the meaning of this section," for although "in good faith" does not necessarily involve absence of notice, yet the fact of there being notice may be an important element in determining whether there was *bond fides*; *Maniklal v. Manchershah*, *I. L. R.* 1 *Bomb.* 269; see also the case of *Radhanath v. Gisborne*, 14 *Moore I. A.* 1; *S. C.*, 6 *Ben. L. R.* 530; *Sitha Ummal v. Rungasami*, 5 *Mad. H. C. Rep.* 385. In the present section, however, the words "in good faith" disappear altogether, and *all* assigns of the trustee for valuable consideration are excepted from its operation, consequently it would seem as if it did not matter whether the purchaser had or had not notice of the trust, or whether the purchase was or was not *bond fide*, so long as the purchaser gave valuable consideration for the trust property. A similar point has been decided under Arts. 133 and 134 in which the words "in good faith" found in the corresponding articles of the Act of 1871 are omitted, and it was held that a suit to recover property purchased for valuable consideration from a mortgagee

was barred in twelve years from the date of purchase, whether it was purchased in good or bad faith; *Baiva Khan v. Bhiku Sazba*, I. L. R. 9 Bomb. 475; followed in *Vishnu v. Balaji*, I. L. R. 12 Bomb. 352. See, also, the notes to these two Articles.

An auction-purchaser acquiring trust property for valuable consideration at a sale in execution of a decree against the trustee is an assignee for valuable consideration within this section, and consequently, the ordinary rules of limitation apply to such a purchaser in a suit brought to recover the property from him on behalf of the trust; *Chintamani v. Sarup Se*, I. L. R. 15 Calc. 703. It is not necessary that an "assign" should be a direct assignee of the trustee; *ib.*, p. 706.

**Sect. 11. Suits on foreign contracts. Foreign limitation law.—**Suits instituted in British India on contracts entered into in a foreign country are subject to the rules prescribed by this Act.

No foreign rule of limitation shall be a defence to a suit instituted in British India on a contract entered into a foreign country, unless the rule has extinguished the contract, and the parties were domiciled in such country during the period prescribed by such rule.

#### *Notes.*

The first clause is a legislative enactment of the maxim of international jurisprudence, that all suits must be brought within the period prescribed by the local law of the country where the suit is brought, otherwise the suit will be barred; *Story, Conf. Laws*. § 577, cited in *Ruckmaboye v. Lulloobhoy*, 5 Moore, I. A. 267; on a matter of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the *forum*; *Lopez, v. Burslem*, 4 Moore P. C. 305; *Alliance Bank of Simla v. Carey*, 5 O. P. D. 429; *British Linen Co. v. Drummond*, 10 B. and C. 903. In cases where a Limitation Act bars the remedy only, a plaintiff having sued on a contract *in loco contractus* and had his suit dismissed on the ground

of limitation, can still sue in the Courts of another country, to which the defendant is subject, on the same cause of action, if it be not barred there ; *Harris v. Quine*, L. R. 4 Q. B. 653.

The second clause is a legislative enactment of the principle laid down in *Huber v. Steiner*, 2 Scott, 327, with the addition that the parties to the contract must have been *domiciled* in the foreign country during the whole of the time appointed for limitation.

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## PART III.

## COMPUTATION OF PERIOD OF LIMITATION.

**Sect. 12.** *Exclusion of day on which right to sue accrues. Exclusion of certain periods in the case of appeals and certain applications.* In computing the period of limitation prescribed for any suit, appeal, or application, the day from which such period is to be reckoned shall be excluded.

In computing the period of limitation prescribed for an appeal, an application for leave to appeal as a pauper, and an application for a review of judgment, the day on which the judgment complained of was pronounced, and the time requisite for obtaining a copy of the decree, sentence, or order appealed against or sought to be reviewed, shall be excluded.

Where a decree is appealed against or sought to be reviewed, the time requisite for obtaining a copy of the judgment on which it is founded shall also be excluded.

In computing the period of limitation prescribed for an application to set aside an award, the time requisite for obtaining a copy of the award shall be excluded.

*Notes.*

This section differs from Sect. 13 of Act IX of 1871 in that the second clause no longer refers in terms to an application to a High Court for the admission of a special appeal, but a special appeal is an appeal, and will doubtless be held to fall under the term "appeal"; and the third clause is new.

The period of limitation will run from midnight of the day from which such period is to be reckoned. See the rules laid down in *Migotti v. Colrill*, 4 C. P. D. 233; where, however, the day from which the time ran had to be included. Where a complaint had to be made within one calendar month after the cause of such complaint has arisen, a complaint made on the 30th June of an

offence committed on the 30th May was held to be in time; *Radcliffe v. Bartholomew* [1892] 1 Q. B. 161.

Where a person was dispossessed of property on the 14th December, and applied on the 14th January to be put in possession again, the 13th January being a Court holiday, it was held he was in time under Art. 158 of Act IX of 1871, Art. 165 of the present Act; *Gujar v. Barve*, I. L. R. 2 Bomb. 673.

With regard to a petition for leave to appeal to Her Majesty in Council, see the notes to Art. 177.

Where a copy of the judgment appealed against need not be presented with the appeal, the time necessary to get a copy of such judgment will not be allowed; *Fazul Muhammed v. Plut Kuar*, I. L. R. 2 All. 192.

The *time requisite* for obtaining a copy of a decree, &c., means the time occupied by the officer who has to provide the copy in making it. It does not commence until an application for a copy has been made; *Bechi v. Ahsan-Ullah*, I. L. R. 12 All. 461 (F. B.); and is determined when the copy is ready for delivery, not when the appellant chooses to apply for it; *Gopal Chunder v. Brojo Behary*, 9 C. L. R. 293; *Parbati v. Bhola*, I. L. R. 12 All. 79; and it includes any delay by reason of the neglect of the officials who issue copies, or those who are required to give notice when such copies are ready; *Sheogobind v. Ablakhi*, I. L. R. 12 All. 105; approved of in *Bechi v. Ahsan-Ullah*, *ubi supra*. Where an application was made for a copy on one day, and the fees paid on the next, it is a question to be determined by the practice of the Court whether both days are to be included in the time necessary for obtaining the copy; *Nobin Chunder v. Brojendro Coomar*, 12 C. L. R. 541; delay in paying the fees after the estimate of the cost of copying has been communicated to the applicant counts against him; *Parbati v. Bhola*, *supra*; but see *Sheogobind v. Ablakhi*, *supra*. Where a party allowed five days to elapse from the date a decree was signed before applying for a copy, and allowed two days to elapse after getting the copy before filing his appeal, it was held that these days could not be counted as time requisite for getting a copy of the decree; *Ramey v. Broughton*, I. L. R. 10 Calc. 652. Where a suitor is unable to obtain a copy of a decree



by reason of the decree not having been signed by the Judge, he is entitled to deduct the time between the delivery of judgment and the signing of the decree in computing the time taken in presenting his appeal; *Bani Madhub v. Kali Shunkar*, I. L. R. 13 Calc. 104, if the delay in signing the decree has delayed the appellant or applicant in obtaining a copy thereof; but where the appellant does not apply for a copy till after the decree has been signed, he is subjected to no delay by reason of the decree not having been signed; *Parhati v. Bhola*, *supra*; *Bechi v. Ahsan-Ullah*, *ubi supra*, dissenting from the foregoing Calcutta case. This section does not authorize the deduction of the time occupied in getting a translation of a decree, but if there has been extreme delay in the office in furnishing a translation, such delay may be ground for extending the time; *Dya Kour v. Amrao Kour*, *Panj. Rec.* No. 145 of 1883. In an appeal by a prisoner in jail, under the Criminal Procedure Code, the time occupied in transmitting the application for a copy of the judgment to the Court and in receiving the copy must be excluded, *Emp. v. Lingaya*, I. L. R. 9 Mad. 258.

What time is or is not requisite is a question of fact to be determined by the Appeal Court, and whether that fact be decided rightly or wrongly, the decision cannot be interfered with in second Appeal; *Tharia Mal v. Nihali*, *Panj. Rec.* No. 6 of 1894.

An appellant is not entitled to a deduction of the time occupied in ascertaining by experiment what the requisite number of folios required for a copy of a judgment is, that ought to be properly estimated when the application for the copy is made; *Gunga Das v. Ramjoy*, I. L. R. 12 Calc. 30.

This section does not allow the time occupied in applying for a review to be excluded from the time for appealing; *Vasudeva v. Chinnasami*, I. L. R. 7 Mad. 584.

**Sect. 13.** *Exclusion of time of defendant's absence from British India.*—In computing the period of limitation prescribed for any suit, the time during which the defendant has been absent from British India shall be excluded.

*Notes.*

This section differs from Section 14 of Act IX of 1871 in that the words "unless service of a summons to appear and answer in the suit can, during such absence, be made under the Code of Civil Procedure, Section 60" are omitted. Act XIV of 1859, Section 18, corresponded with the same section of the Act of 1871. The alteration in this section brings the law into accord with the English law as laid down in *Ruckmaboye v. Lulloobhoy Motirhund*, 5 Moore I. A. 234; and in *Musurus Bey v. Gadban* [1894] 1 Q. B. 533.

This section applies to the absence of defendants only, and there is no similar section which applies to plaintiffs, although their absence may have been involuntary, through transportation; *Domun v. Shobu Roolall*, 10 W. R. 253. It further applies only to defendants in favour of plaintiffs, so as to prevent limitation running against the latter, and only in respect of the first institution of the suit; therefore it is not applicable to a defendant, who has been absent from British India, and wants to set aside proceedings in execution; *Ashan Khan v. Gunga Ram*, I. L. R. 3 All. 185; and it applies to all defendants absent from India, even if they have never been there, and cannot be limited to such persons as may have been present there, or would ordinarily be present, or may be expected to return; *Atul Kristo v. Lyon*, I. L. R. 14 Calc. 457; *Partab Singh v. Provincial Bank of India*, Panj. Rec. No. 72 of 1891.

At Calcutta, *Tottenham and Morris, JJ.*, have ruled that this section does not apply where a defendant, though absent from British India, has a duly constituted agent and Mooktiar in British India; *Harrington v. Gunesh Roy*, I. L. R. 10 Calc. 440. This case, however, seems to be directly opposed to the ruling in *Ruckmaboye's* case, *ubi sup.*, where the Privy Council held that the fact that the plaintiff could have sued the defendant, by reason of constructive habitation, during the time he was "beyond seas," did not prevent her from having the benefit of this time; and the High Court at Calcutta has since ruled that a defendant is within this section notwithstanding his having carried on a trade or had

a shop or house of business under an agent in British India ; *Atul Kristo v. Lyon*, *ubi supra*, remarking that if the same state of facts arose again, the case of *Harrington v. Gunesh Roy* would have to be re-considered.

This section does not cause the exclusion of the time of the defendant's absence from British India to cease altogether, when he returns thereto as the English statutes do, so as to prevent a plaintiff taking advantage of a subsequent absence of the defendant, but allows the whole time occupied by any number of absences to be counted, and that, whether time had begun to run before the first absence or during it ; *Beake v. Davis*, *I. L. R. 4 All. 530* ; *Hanmantram Sadhuram v. Bowles*, *I. L. R. 8 Bomb. 561* ; dissenting from *Naronji Bhimji v. Mugniram Chandaji*, *I. L. R. 6 Bomb. 103*, which may now be considered to be over-ruled ; *Atul Kristo v. Lyon*, *ubi supra*.

**Sect. 14.** *Exclusion of time of proceeding bonâ fide in Court without jurisdiction, and of time occupied in certain other proceedings.*—In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or in a Court of appeal against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.

In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, Section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed, to the Court in which the suit is re-instituted, shall be excluded.

In computing the period of limitation prescribed for any application, the time during which the applicant

has been making another application for the same relief shall be excluded, where the last-mentioned application is made in good faith to a Court which from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

*Explanation 1.*—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

*Explanation 2.*—A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.

*Notes.*

The first clause of this section is altered from Sect. 15 of Act IX of 1871 in the following particulars: "another civil proceeding" is substituted for "another suit," and thus exemption is not confined merely to the time occupied in the prosecution of a suit strictly so-called; "same cause of action" is substituted for "same right to sue," but this apparently is not intended to make any alteration in the meaning; the second and third clauses are new, the latter being a legislative affirmation of the effect of the rulings in *Promotho Nath v. Watson*, 24 W. R. 303; and *Hira Lall v. Budri Das*, 7 I. A. 167; S. C., I. L. R. 2 All. 792; and does away with the effect of the ruling in *Banee Kant v. Haran Kisto*, 24 W. R. 405; *Jiwan Singh v. Sarnam Singh*, I. L. R. 1 All. 97, and other cases to a like effect, and this Act has consequently provided that in it the word "suit" shall not include "application."

The first two clauses of the Section only apply to suits, not to applications, and the third clause is the only one which applies to applications. A suit which a Court is not legally entitled to entertain is not "another application," for the same relief; *Sheoji Ram v. Sheo Chand*, Panj. Rec. No. 63 of 1886.

*Prosecuting.*—A man urging as defendant the same claim as he afterwards prosecutes as plaintiff is entitled to a deduction of the time occupied by the former suit; *Jugutender v. Din Dyal*, 1 W. R. 310.

*Against the defendant.*—No deduction can be allowed for time lost in litigation against a wrong party; *Munna Jhumna v. Laljee Roy*, 1 W. R. 121; *Kawasjee v. Burjorjee*, 8 Bomb. H. C. Rep. 224; *Pandharinath v. Pralhad*, P. J. 1876, p. 52; a suit against one only of the present defendants will not, as against the others, fall under this section, *Surmukai v. Kristo Das*, 5 W. R. 281; but where the first suit is brought against two defendants and the second against one of them only, the case may come within this section. Thus, where the plaintiff, as payee of an order drawn by the defendant at Ahmedabad, where he resided, which was dishonoured on presentation by the drawee, filed a suit in Surat against the drawer and drawee (against the latter of whom, however, he had no cause of action); and permission having been refused by the High Court to the Court at Surat to try the case against the drawer, he then withdrew the plaint and filed a suit against the drawer, alone at Ahmedabad; it was held that he was entitled to deduct the time occupied in the former suit; *Kahandas Narandas v. Dahiabhai*, I. L. R. 3 Bomb. 182.

Where a plaintiff brought two suits against two different branches of the same family to recover a share of the property and the possession of each, and these were dismissed on the ground of their being improperly framed, he cannot be allowed any deduction for the time occupied in these suits when he brings a consolidated suit against both branches of the family; *Joitaram v. Bai Ganga*, 8 Bomb. H. C. Rep. 228; followed in *Tukaram v. Naro*, P. J. 1888, p. 285.

*Same cause of action.*—A plaintiff does not sue on the same cause of action who claims the same land, first under one title, and failing on that, then on another; *Parakut v. Edapally*, 2 Mad. H. C. Rep. 266. A, to whom money was due from B, filed a suit against B to redeem certain property mortgaged to him on pay-

ment of the amount of the mortgage money less a certain amount due by B, alleging an agreement to the effect that the mortgage might be redeemed at any time on payment of such balance. The Court held that the agreement was not proved, and ordered redemption on payment of the full amount of the mortgage money. Subsequently A sued B for the money due by him, the suit being out of time as regards limitation, and claimed the benefit of this section, but it was held that the former suit was not a proceeding prosecuted on the same cause of action as the latter, and that the plaintiff's claim therein was not dismissed for want of jurisdiction or any like cause; *Mangu Lal v. Kandhai Lal*, I. L. R. 8 All. 475. A plaintiff who wrongly sues a tenant in ejectment and loses his case cannot have the benefit of the time spent in that suit when he afterwards sues for rent accrued due while the other suit was pending; *Hurro Pershad v. Gopal Chunder*, 9 I. A. 82; S. C., I. L. R. 9 Calc. 255; 12 C. L. R. 129. Proceedings upon an award which was remitted to the arbitrators for reconsideration, and proceedings upon the same award with modifications the result of reconsideration by the arbitrators are proceedings upon the same cause of action; *Niadar Mal. v. Shunkar Das*, Panj. Rec. No. 67 of 1889.

*Defect of jurisdiction.*—A defect of jurisdiction is due to the provisions of the law itself not having been complied with, so that the Court is incompetent *ab initio* to try the case on its merits, and the inability of the plaintiff through his own laches to prove his case does not constitute a defect of jurisdiction; *Bai Jamna v. Bai Ichha*, I. L. R. 10 Bomb. 604; *Ramchand v. Shadi Ram*, Panj. Rec. No. 19 of 1888; *Sultan v. Alabaksh*, *ib.* No. 45 of 1893; and this section does not contemplate cases in which, the facts being fully apparent, a suitor, from simple ignorance of the law, has filed his suit in the wrong Court, but is limited to cases where, from a *bond fide* mistake of fact, the suitor has been led into litigating in a wrong Court; *Ramjivan v. Chand Mal*, I. L. R. 10 All. 587; approved of in *Chajmal v. Jagdambra*, I. L. R. 11 All. 408; followed in *Narasimma v. Muttayan*, I. L. R. 13 Mad. 451. Where a plaintiff, relying upon the defendant's representation of his place of residence, brought

his suit in a Court which, it turned out, had not jurisdiction; it was held that the time of the pendency of the suit in that Court could be excluded; *Banee Madhub v. Bipro Dass*, 15 W. R. 69.

Where a plaint was filed in the Subordinate Judge's Court, and after seven months returned to be presented in the Munsiff's Court, as it was overvalued, this time was allowed; *Obhoy v. Kri-tartha*, I. L. R. 7 Calc. 284; so, too, where a plaint is returned by the Munsiff as undervalued; *Chandi v. Jankiram*, 1 Ben. L. R. Short Notes, 12. A plaint was filed in the District Munsiff's Court, and being found on investigation to be undervalued was, after six months, returned to be filed in the District Court, and this time was allowed; *Seshama v. Sankara*, I. L. R. 12 Mad. 1.

A suit was filed in the Munsiff's Court which he dismissed as being beyond his jurisdiction. On appeal, the District Judge held that the Munsiff had jurisdiction, and ordered him to try the case. On further appeal, the High Court set aside the order of the District Judge and directed him to ascertain the value of the land in dispute in the suit, and pass a fresh order. When that inquiry had been held, the Judge confirmed the original order of the Munsiff; and it was held that the plaintiff under this section was entitled to be allowed the whole of the time occupied in this suit up to the final order of the District Judge; *Sankaran v. Parvathi*, I. L. R. 12 Mad. 434. Where a suit was filed in the Munsiff's Court to take the accounts of a partnership, and in the course of the evidence it appeared that there had been a settlement of accounts between the parties, in consequence whereof the suit ought to have been brought in the Small Causes Court, and the Munsiff dismissed it; it was held that the plaintiff was entitled to a deduction of the time the suit was pending in the Munsiff's Court; *Saminadha v. Samban*, I. L. R. 16 Mad. 274.

Where a defendant is found after the issue of the summons in a suit to have been dead before the filing of the plaint, the Court has no jurisdiction to decide the suit against him, and the plaintiff may have a deduction of the time occupied in that suit when he sues the defendant's representatives; *Mohun Chunder v. Azam Gazeer*, 12 W. R. 45.

Where the certificate of the Collector under the Pension's Act XXIII of 1871, Section 6, was required to give the Court jurisdiction, and the defendant did not object to its absence until the case was almost finished, it was held that the plaintiff, in a subsequent suit, might be allowed the time taken up with this suit; *Putali Meheti v. Tulja*, I. L. R. 3 Bomb. 223.

Whenever under the Dekkan Agriculturist Act, a certificate of conciliation is required before bringing a suit, the time between the application to the conciliator and the grant of a certificate by him must be excluded from limitation; *Durgaram v. Shripati*, I. L. R. 8 Pomb. 411; *Venkatrao v. Bijesing*, I. L. R. 10 Bomb. 108.

Where a suit was brought in the Revenue Court for arrears of rent, but it was held that the case did not fall under the Bengal Act VIII of 1869, and the suit was dismissed, it was held that when the plaintiff sued in the Civil Court on the same cause of action, he was entitled to deduct the time occupied by the suit in the Revenue Court; *Gobindo v. Manson*, 15 Ben. L. R. 56; so too, where a plaintiff tried to get an invalid certificate under Sect. 8 of Ben. Act VII of 1880 set aside by the Revenue authorities who, however, had no jurisdiction to give him relief; it was held that the time so occupied could be allowed him; *Girjanath v. Ram Narain*, I. L. R. 20 Cal. 264. See also *Ram Logan v. Bhawani*, I. L. R. 14 Cal. 9.

This section does not apply where the plaintiff brought his suit in a Foreign Court which, according to its own laws, had ample jurisdiction, but had none according to the laws of British India; *Parry v. Appasami*, I. L. R. 2 Mad. 407. *Quære*, whether the time spent in litigating in a Foreign Court without any jurisdiction could be allowed; *ib.*

The time occupied in a suit in which the plaintiff was *nonsuited*, cannot be deducted, much less, time occupied in appealing from the nonsuit; *Chunder Madhub v. Bissessuri*, 6 W. R. 184. So, too, where the former suit is brought by the wrong plaintiff, no deduction can be made. Thus, where the plaintiff's manager brought a suit in his own name for the value of trees cut down



by the defendants on the plaintiff's ground, which was dismissed as he had no cause of action, and the plaintiff subsequently sued the defendants, it was held that he could not have credit for the time occupied in the former suit; *Rajendro Krishore v. Bulaky Mahlon*, *I. L. R.* 7 *Calc.* 367.

Where a suit is dismissed for want of jurisdiction, and the plaint returned to be presented in a proper Court, and the plaint with an additional defendant is then presented in another Court to which the same objection applies with respect to jurisdiction, and the suit is again dismissed; this section is not applicable when the plaintiff appeals against the former dismissal, so as to enable him to count the time spent in the second suit; *Narain v. Muhammad*, *Panj. Rec.* No. 115 of 1881.

A set-off, disallowed on a point of law, is not disallowed for defect of jurisdiction; *Hafizunnissa v. Bhyrab Chunder*, 13 *C. L. R.* 214.

*Other causes of a like nature.*—Misjoinder of causes of action or of parties is a cause of a like nature with defect of jurisdiction; *Deo Pershad v. Pertab Koere*, *I. L. R.* 10 *Calc.* 86; *S. C.* 13 *C. L. R.* 218; dissenting from *Ram Subhag v. Govind Prasad*, *I. L. R.* 2 *All.* 622, where it was held that the misjoinder of plaintiffs was not a cause of a like nature; but, on this point, see the cases under the heading "against the defendant"; for it should be noted that, under this section, the suit, besides being dismissed for a like cause for want of jurisdiction, must have been brought against the same defendant, and for the same cause of action. Causes for which the withdrawal of a suit or application may be permitted are not causes of a like nature, therefore the time occupied in a suit permitted to be withdrawn cannot be allowed; *Pirjade v. Pirjade*, *I. L. R.* 6 *Bomb.* 681; as where the plaintiff withdrew the suit because it was defective for want of parties; *Krishnaji v. Vithal Ravji*, *I. L. R.* 12 *Bomb.* p. 633; nor where the suit is dismissed because the cause of action was vested in the plaintiff and others who were not parties to the suit; *Jema v. Ahmad Ali*, *I. L. R.* 12 *All.* 207, following *Ram Subhag v. Gobind Prasad*, *ubi supra*; and *Chunder Madhub v. Bissesuri*, 6 *W. R.* 184; *Tirtha Sami v. Seshagiri*, *I. L. R.* 17 *Mad.* 299.

Where a plaintiff applied under Sect. 525, C. P. C., for a decree in terms of an award, which was passed by the original, and affirmed by the first appellate Court, but refused by the second appellate Court on the ground that the award was too indefinite, and the plaintiff then filed a suit upon the award; it was held that he might be allowed the time occupied in the summary proceedings as a cause of like nature; *Dharm Das v. Eshri Pershad, Panj. Rec.* No. 59 of 1884.

Misstatement of a cause of action in not setting out facts which would have shewn that the claim was not barred, in consequence of which the suit was dismissed, is not a cause of a like nature; *Nobin Chunder v. Rojomoye, I. L. R.* 11 *Calc.* 264.

The laches of a plaintiff in not having registered a sale certificate at the time he brought his first suit is not a cause of a like nature; *Bai Jumna v. Bai Ichha, I. L. R.* 10 *Bomb.* 604.

*Disposal of first suit.*—The fact that the second suit was filed before the first Court had actually dismissed the suit before it for want of jurisdiction is immaterial; *Morris v. Sapantheela*; 6 *Mad. H. C. Rep.* 45.

A Court in returning a plaint to the plaintiff in a suit in which it has no jurisdiction, has no authority to fix a time within which the plaint is to be presented to a Court having jurisdiction, and if it does do so, that fact will not in any way affect the time to be allowed to the plaintiff, *Venkata Narasimha v. Venkata Kristnia*, 5 *Mad. H. C. Rep.* 410.

This section does not apply to suits for arrears of rent under Act. X of 1859; *Nagendro v. Mathura, I. L. R.* 18 *Calc.* 368 (*F. B.*); following *Unnodav. Kristo Coomar*, 15 *Ben. L. R.* 60 (*n.*) and 19 *W. R.* 5 (*P. C.*)

This section does not apply to appeals; *Jag Lal v. Har Narain, I. L. R.* 10 *All.* 524; but where an application was made to the revisional jurisdiction of a Court for the same relief as might have been obtained in an appeal, which application was dismissed for want of jurisdiction, it was held the Court could act under Section 5; *Balvant Singh v. Gumani Ram, I. L. R.* 5 *All.* 591; but would not be bound to do so; *Ramjiwan v. Chand Mal, I. L. R.* 10 *All.* p. 592.

**Sect. 15.** *Exclusion of time during which commencement of suit is stayed.*—In computing the period of limitation prescribed for any suit, the institution of which has been stayed by injunction or order, the time of the continuance of the injunction or order, the day on which it was issued or made, and the day on which it was withdrawn, shall be excluded.

*Notes.*

This section with a few verbal alterations which do not alter its effect is the same as Sect. 16 of Act IX of 1871.

It applies to the institution of suits only, as in this Act "suit" does not include either "appeal" or "application." Therefore where an injunction, obtained against the execution of a decree (application for which had already been made), has been dissolved, the time during which it was in force cannot be deducted under this section; *Kalyanbhai v. Ganashamlal*, I. L. R. 5 Bomb. 29; *Lutful Huk v. Sumbhudin*, I. L. R. 8 Calc. 248; *S. O.* 10 C. L. R. 143; but under Art. 178, the right to apply for execution will accrue from the date of the dissolution of the injunction; *Kalyanbhai v. Ganashamlal*, *ubi sup.* The High Court at Madras has, however, held that where the injunction has been issued before any application has been made, but after the right to execute has accrued, time will continue to run in spite of the existence of the injunction; *Rajaratnam v. Shevalayammal*, I. L. R. 11 Mad. 103.

A widow of a deceased partner in a firm filed a suit against the surviving partner to wind up the partnership, and obtained an order prohibiting him from collecting any sums due to the firm. Subsequently, a receiver was appointed to get in the assets of the firm. It was held that the time which had elapsed from the date of the injunction to the appointment of the receiver must be deducted in ascertaining whether a suit brought by the receiver against a debtor to the firm was barred or not; *Shunmugam v. Moidin*, I. L. R. 8 Mad. 229; and the fact that the surviving partner might have applied for leave to sue for any specific debt made no difference, as he was not bound to apply; *ib.*

An order attaching a debt under Sect. 268, C. P. C., is not an injunction or order staying a suit within the meaning of this section, as such an order does not prevent the creditor bringing a suit for the debt, but only from receiving from the debtor the amount thereof, and if the suit be not brought within the time limited by the second schedule hereto for the particular suit, such suit will be barred; *Shib Singh v. Sita Ram*, I. L. R. 13 All. 76; followed in *Collector of Etawah v. Beti Mahurani*, I. L. R. 14 All. 162; nor is an injunction obtained by a third party restraining the judgment-creditor from bringing a debt to sale in execution of a decree, an injunction or order staying the institution of a suit upon the bond by the obligee; *ib.*

**Sect. 16.** *Exclusion of time during which judgment-debtor is attempting to set aside execution sale.*—In computing the period of limitation prescribed for a suit for possession by a purchaser at a sale in execution of a decree, the time during which the judgment-debtor has been prosecuting a proceeding to set aside the sale shall be excluded.

*Notes.*

This is the same as Sect. 17 of Act IX of 1871, except that the word “proceeding” has been substituted for “suit.”

The articles to which this applies are Arts. 137 and 138.

**Sect. 17.** *Effect of death before right to sue accrues.*—When a person who would, if he were living, have a right to institute a suit or make an application, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased capable of instituting or making such suit or application.

When a person against whom, if he were living, a right to institute a suit or make an application would have accrued, dies before the right accrues, the period of limitation shall be computed from the time when there is a legal representative of the deceased against whom the plaintiff may institute or make such suit or application.

**Nothing in the former part of this section applies to suits to enforce rights of pre-emption or to suits for the possession of immoveable property or of an hereditary office.**

*Notes.*

Sect. 18 of Act IX of 1871 in terms only applied to suits, the present section applies to suits and applications ; and the exception of suits to enforce right of pre-emption is newly inserted.

To bring this section into operation the death must occur *before* the right to sue or make an application accrues. If the right accrues in the life-time of the deceased, the period of limitation begins to run from the date of accrual, and it matters not, as far as limitation is concerned, in that case whether, by a will proved, or by any other means, a legal representative comes into existence, or not; *Boatwright v. Boatwright*, *L. R. 17 Eq. 71*. If a creditor dies intestate on the day a debt becomes payable to him, and there is no evidence to shew whether he died before or after the moment when the debt became payable, the Statute of Limitations does not run against the administrator until letters of administration have been taken out; *Atkinson v. The Bradford Building Society*, *25 Q. B. D. 377*.

When a manager, up to the hour of his death, has not been called upon by his employers to account to them, on his death a fresh right to an account accrues to the employers against his representatives, and limitation does not commence to run until administration has been taken out to the estate of the deceased *i. e.*, in those cases where an administration is necessary in order to constitute a legal representative; *Lawless v. Calcutta Landing and Shipping Co.*, *I. L. R. 7 Calc. 627*.

A certificate of administration under Bombay Reg. VIII of 1827 only confers a right of management and does not constitute the holder a representative of the estate for the purpose of distributing it among the co-sharers ; consequently, the existence of such a certificate does not make the holder a person against whom a sharer could institute a suit for his share; *Keshav v. Narayan*, *I. L. R. 14 Bomb. p. 240*.

**Sect. 18. *Effect of fraud.***—When any person having a right to institute a suit or make an application has, by means of fraud, been kept from the knowledge of such right or of the title on which it is founded, or where any document necessary to establish such right has been fraudulently concealed from him, the time limited for instituting a suit or making an application.

(a) against the person guilty of the fraud or accessory thereto, or

(b) against any person claiming through him otherwise than in good faith and for a valuable consideration,

shall be computed from the time when the fraud first became known to the person injuriously affected thereby, or, in the case of the concealed document, when he first had the means of producing it or compelling its production.

*Notes.*

This section is the same as Sect. 19 of Act IX of 1871 with the exception that it is in specific terms made applicable to applications as well as suits; and with the same exception is substantially the same as Sect. 9 of Act XIV of 1859.

This section differs from 3 and 4 *Wm. IV.*, c. 27, s. 26, in that that section applies to cases in which a person has been *deprived* of his rights by fraud, and under it a *subsequent fraudulent concealment* by the defendant or those through whom he claims will not avail the plaintiff; *Lawrance v. Norreys*, 15 *App. Cal.* 210; while this section provides for any fraudulent concealment of the plaintiff's right to institute a suit whether in the act of deprivation or subsequent thereto.

To bring this section into operation there must be an actual concealment of his rights from the plaintiff, and the facts must lead to the inference that there was a design to keep him in the dark; *Arsala v. Yar Muhammad*, *Panj. Rec.* No. 32 of 1881; *Nihal Chand v. Foujdar Singh*, *ib.* No. 3 of 1882; *Ghiba v. Hayat*,

*ib.* No. 120 of 1883; *Gauhri v. Jainti*, *ib.* No. 73 of 1885; which is the same thing as saying that there must have been a *fraudulent* concealment by the defendant, or some one through whom he claims, of the plaintiff's right; *Muksood v. Gowhur*, *W. R.* 1864, 364; *Gibbs v. Guild*, 9 *Q. B. D.* at p. 65; *Rahimbhai Hubibbhai v. Turner*, *L. R.* 14 *Bomb.* p. 427; or of some document necessary to establish that right; and that the plaintiff, or some person through whom he claims, must have been by such fraud deprived of the subject matter which he claims; *Lawrance v. Norreys*, 15 *App. Ca.* 210; *Willis v. Earl Howe* [1893], 2 *Ch.* 545; *Thorne v. Heard* [1894], 1 *Ch.* 599. If it be alleged that the fraud was committed by the servant or agent of the defendant, it must be shewn that it was committed for the general or special benefit of the principal, who will not be affected by the fraudulent act if it was committed for the private purposes of the servant or agent; *British Mutual Banking Co. v. Charmwood Forest Ry. Co.*, 18 *Q. B. D.* 714; *Thorne v. Heard*, *ubi supra*. If the case be one of concealment of a document, it must be a document that was necessary for the establishment of the plaintiff's right, and he must in consequence of the concealment have been unaware of its existence; *Mungamuru v. Srimant Raja*, 7 *Mad. H. C. Rep.* 22.

If there is no fraud the time runs from the period fixed by the Limitation Act in force for the time being, notwithstanding the fact that the plaintiff had not then knowledge of the invasion or accrual of his right, or of the breach of contract; *Granger v. George*, 5 *B. and C.* 152; *Azroal Singh v. Lalla Gopeenath*, 8 *W. R.* 23; *Reaz Ali v. the Government of India*, 19 *W. R.* 269; *Jaithai Raichund v. Rupchund*, *P. J.* 1890, p. 268; or was not aware of the existence of the subject matter which is the subject of his claim; *Rains v. Buxton*, 14 *Ch. D.* 537; but there are cases where the mere concealment amounts to fraud, thus, where an agent receives money on account of his principal and conceals that fact from him, such concealment is a fraud, and limitation will run from the time the principal discovers the fraud; *Hussain Buksh v. Syud Tussuduck*, 21 *W. R.* 245.

Where the plaintiff was ousted from property under colour of a fictitious revenue sale in pursuance of a fraudulent contract, and the fraud had been so contrived as to make the plaintiff believe that he had no right of action at all, it was held that the plaintiff was protected against limitation until he came to know of the fraud; *Dwarkanath v. Ajoodhya*, 21 *W. R.* 109. When irregularities affecting the validity of a sale in execution of a decree have, by the fraud of the judgment-creditor or other parties to the sale, been kept from the knowledge of the judgment-debtor, he is entitled, whether the sale has been confirmed or not, to make as against the person guilty of the fraud such application (if any) under Sect. 311, C. P. C., as he may be entitled to make, his time for making the application being calculated from the time the fraud first became known to him; *Mohendro v. Gopal*, *I. L. R.* 17 *Cal.* 769 (*F. B.*). See, also, the notes on fraudulent sales, under Art. 12.

The bringing up of an illegitimate son, born before the eldest legitimate son, as a legitimate son, is a fraudulent concealment of the right of the eldest legitimate son; *Vane v. Vane*, *L. R.* 8 *Ch.* 383. Where A sold a decree to B, but after the sale fraudulently realized the amount from the judgment-debtor, it was held that, in a suit brought by B against A to recover back his purchase-money, limitation would run from the time B first discovered the fact that A had recovered the debt; *Gopal Chundra v. Pemu Bibi*, 1 *Ben. L. R. A. O. J.* 76.

*Knowledge*—is not mere suspicion; it is such definite knowledge as will enable the person defrauded to seek his remedy in Court; *Natha v. Jadha*, *I. L. R.* 6 *All.* at p. 415; followed in *Daji v. Raghunath*, *P. J.* 1887, p. 344; see also *Rehmoobhoy Hubibbhai v. Turner*, *I. L. R.* 14 *Bomb.* p. 414; or as was laid down by the Privy Council, where there is fraud, the defendant must show the plaintiff's clear and definite knowledge of the facts constituting the fraud at a date beyond the statutable period in order to bar the suit, it is not sufficient to shew that the plaintiff had received some hints and clues which might have led to such knowledge, the defendant meanwhile keeping back the main evidence of the fraud; *Bahimbhai v. Turner*, 20 *Ind. App.* 1.



Where a plaintiff has been in a position in which he might have known of the fraud, and ought to have known it, it must be presumed that he did know of it; *Indrabhoosun v. Kenny*, 3 W. R. S. C. C. Ref. 9. In any particular case the court, having regard to the nature of the fraud, the facility with which it may be known, and the likelihood of attention being called to it, may infer such knowledge when the means of knowledge first came, or for a reasonable time have been within the plaintiff's reach, or in other words may hold the plaintiff fixed with constructive knowledge of the fraud; *Nilmoney v. Nilu Naik*, I. L. R. 20 Calc. p. 432.

The question when knowledge was obtained is one of pure fact; *Krishnan v. Sridevi*, I. L. R. 12 Mad. 512 (P. C.). Where vendors have complained of fraud on the part of the vendee to an authority incompetent to take cognizance thereof, they must be assumed to have been acquainted with all the facts entitling them to set aside the sale, and limitation will run against them and against any others claiming under them who attempt to set up the alleged fraud, from that time at least; *Jugaldas v. Ambashankar*, I. L. R. 12 Bomb. 501.

The fact that a document which is alleged to have been fraudulently concealed has been registered would seem to displace the allegation of concealment; *Venkateswara v. Shekhari Varma*, I. L. R. 3 Mad. at p. 398 (P. C.); so, too, does the production of the document before a public officer or in a Court in support of a claim; *ib.* 399; *Ghiba v. Huyat*, Panj. Rec. No. 120 of 1883.

Where a special period of limitation is fixed by an Act, other than this Act, for the bringing of a particular suit, and the plaintiff is prevented by fraud from acquiring knowledge of the right, then the special period so fixed will run from the time he discovers the fraud; *Venkata v. Chengadu*, I. L. R. 12 Mad. 168.

**Sect. 19. Effect of acknowledgment in writing.**—If, before the expiration of the period prescribed for a suit or application, in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against

whom such property or right is claimed; or by some person through whom he derives title or liability, a new period of limitation according to the nature of the original liability shall be computed from the time when the acknowledgment was so signed.

When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but oral evidence of its contents shall not be received.

*Explanation 1.*—For the purposes of this section an acknowledgment may be sufficient, though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance, or enjoyment has not yet come, or is accompanied by a refusal to pay, deliver, perform, or permit to enjoy, or is coupled with a claim to a set-off, or is addressed to a person other than the person entitled to the property or right.

*Explanation 2.*—In this section “signed” means signed either personally or by an agent duly authorized in this behalf.

*Notes.*

Sect. 4 of Act XIV of 1859, and Sect. 20 of Act IX of 1871 related only to *debts* and *legacies*, but Cl. 15 of Sect. 1 of the former Act and Arts. 147 and 148 of the second schedule to the latter Act provided for acknowledgments in the case of *depositories*, *pawnees*, and *mortgagees*. *The present section applies to every kind of property or right.* The Act of 1859 required that the acknowledgment should be signed by the person chargeable; the Act of 1871 and the present section permit the acknowledgment to be made by an agent properly authorized; and also provide for the case of acknowledgments by a person through whom the party sued derives his title or liability. The Act of 1859 did not require the acknowledgment to be made before the expiry of the prescribed period, the Act of 1871 and the present section require it to be made before the expiry of that period. The provision in the present section that oral evidence of the contents of

the acknowledgment shall not be received was applied in the Act of 1871 to cases in which it was alleged to have been lost or destroyed; to what it refers in the present Act will be hereafter discussed. In *explanation 1*, in Act IX of 1871, the acknowledgment was required to "amount to an *express* undertaking to pay or deliver the debt or legacy"; this provision does not appear in the present section. *Explanation 2* in the former Act now appears as Sect. 21 in this Act.

*Acknowledgment of liability.*—The principles of a large number of the English decisions are not applicable to provisions like those of the present section; they depend not upon the effect of an exception in a statute, but upon the principles of the Common Law with respect to the cause of action. The issue joined made it incumbent upon the plaintiff to prove a promise made within six years, and such as to agree with that laid in the declaration, consequently acknowledgments, whether by words or acts, were of no avail, except so far as they sustained the promise alleged. But the cases in which acknowledgments are operative by way of exception are of a different character. In these, the action must be maintained on the original cause of action; and an acknowledgment within the prescribed period of limitation shews that the obligation was then subsisting and unsatisfied; a promise to pay is not required; *Gopeekishen v. Brindabun*, 13 *Moore I. A.* 37, at p. 54. The omission from the present section of the words used in Act IX of 1871, requiring the acknowledgment to amount to an express undertaking to pay the debt, makes this decision a correct exposition of the law on this point at the present time.

This section requires that there should be a distinct and definite acknowledgment of an existing liability in respect of some property or right, and there cannot be such an acknowledgment without the knowledge that the party is admitting something; *Dharma v Govind*, 1 *L. R.* 8 *Bomb.* 99, at p. 102. Therefore, where a mortgagee, having obtained a decree against the mortgagor for the possession of the mortgaged property, and after having been put in possession thereof by the officers of the Court, gave them

a receipt acknowledging receipt of the possession, it was held that this receipt acted solely as an acknowledgment of having received possession of the land, and did not amount to an acknowledgment of a mortgage subsisting at the date it bore; *ib.*; but the statement in a plaint of the jural relations between the plaintiff and the defendant with a view to the enforcement of the plaintiff's rights would be a sufficient acknowledgment of those relations; *ib.*; this was not so under Act XIV of 1859, which did not allow the signature of an agent, unless the plaint was actually signed by the plaintiff himself; *Luchmee v. Runjeet*, 18 B. L. R. P. C. 177; but this case no longer governs the law. Where a mortgagor filed a suit for possession on payment of a specified sum of money, and the defendants, in their written statement, distinctly acknowledged the existence of the mortgage, that acknowledgment was held to avail the heir of the mortgagor in a suit to redeem the mortgage brought more than sixty years after its date; *Balmokand v. Ramji Lal*, *Panj. Rec.* No. 20 of 1887. Where the defendants attested as correct the record-of-rights prepared at a settlement with them of an estate of which they were in possession, in which they were described as mortgagees of the estate, but which did not mention the name of the mortgagors, it was held that this was a sufficient acknowledgment of the mortgagor's right to redeem; *Daia Chand v. Sarfraz*, *I. L. R.* 1 *All.* 117; but where in a Settlement record there was an entry of the defendants in the proprietor's column as mortgagees in possession of the mortgagor's land, but there was no special signature to the entry and the only signatures were those of one of the defendants and four other *lambadars* at the end of the record, it was held that this was not a sufficient acknowledgment by the defendants of the existence of the mortgage; *Jawala v. Sher Singh*, *Panj. Rec.* No. 116 of 1891. The acceptance of a sale certificate, granted by a Court to the purchaser of the right, title, and interest of a mortgagee, sold in satisfaction of a decree against him, is not an acknowledgment by the purchaser of the title of the mortgagor, so as to give him a fresh starting point for a new period within which he can redeem; *Ambala v. Naduvakat*, *I. L. R.* 6 *Mad.* 325. A bond given for the amount of interest due under a mortgage is an

acknowledgment of the existence of the mortgage, *Doming v. Antone*, P. J. 1889, p. 39.

The acknowledgment must be one of liability to the person suing, or to some one through whom he claims; *Mylapore v. Yeo Kay*, I. L. R. 14 Calc. 801; 14 I. A. 168; and it must be of liability in respect to the right claimed in the suit, not of some different liability. Thus, in a suit against a defendant as tenant from year to year, an acknowledgment that he was a permanent tenant is of no avail; *Venkataramanaya v. Srinivasa*, I. L. R. 6 Mad. 182. See, also, *Narayanappa v. Bhasker*, 7 Bomb. H. C. Rep. A. C. J. at p. 129. But where a suit is brought to recover a debt for which a *hundi* had been given and dishonoured, a letter by the defendant acknowledging his liability on the *hundi* is a sufficient acknowledgment of the debt; *Raman v. Vairavan*, I. L. R. 7 Mad. 392. The acknowledgment of the fact of a mortgage, of possession taken under it, and of a subsequent agreement altering the rights of the parties is not an acknowledgment of an existing right to redeem; *Ram Das v. Birjnundun*, I. L. R. 9 Calc. 616.

The acknowledgment, too, must be in some principal document made on a certain date, for the section provides that there shall be a new starting point from the date of the acknowledgment. Therefore a series of letters, in none of which there is any definite acknowledgment of indebtedness, but from which it may possibly be inferred that some debt was due is not sufficient; *Rogers v. Montriou*, 6 Ben. L. R. at p. 554.

It is not necessary that the plaintiff should assent to the amount which is acknowledged to be due by the debtor at the time the acknowledgment is given; it is quite sufficient that he relies upon it in the suit he brings, and that between the time of the acknowledgment being made and the suit brought, the defendant has allowed it to remain uncontradicted and unexplained; *Lalji Sahoo v. Rughomundum*, I. L. R. 6 Calc. at p. 452.

Acknowledgments may be given of the right to *execute a decree* so as to avoid limitation, as well as of any other right;

*Ramhit v. Satgur*, I. L. R. 3 All. 247; *Toree Mahomed v. Madhub*, I. L. R. 9 Calc. 730; 13 C. L. R. 91. The case of *Ramhit v. Satgur* was approved of in *Ram Coomar v. Jakur Ali*, I. L. R. 8 Calc. 716; and in *Bhagat v. Chint*, Panj Rec. No. 28 of 1885; but disapproved of in *Rama Rau v. Venkatesa*, I. L. R. 5 Mad. 171 (F. B). The Calcutta and Madras cases were decided just about the same date, and consequently each was unknown to the court deciding the other at the time of decision. Under the Act of 1871, the word "debt" in Sect. 20 of that Act was held not to include a liability for which a judgment had been obtained and consequently that an acknowledgment of liability under a decree did not extend the time for execution; *Kally Prosonno v. Heeralall*, I. L. R. 1 Calc. 468; approved of and followed in *Mungul Prashad v. Kanti Lahory*, I. L. R. 5 Calc. 708, which was overruled in 8 I. A. 123 on other points, it not being necessary as the case was then presented to the Privy Council to go into this point. If these two decisions on the Act of 1871 are good law the change of wording in the present section would go far to support the cases decided in Allahabad and Calcutta thereon. But, in any event, it is difficult to see why the words "an application, in respect of any \* \* right" should not include an application in respect of a right to execute a decree. The Madras Court seem to have been oppressed with a vague sense of some undefined inconvenience which might be the result of applying this section to applications made in the course of suits and proceedings, and did not go to the root of the matter and decide whether the words were sufficient to cover such applications, but, because there were other applications to which they might be suitable, said that the Legislature did not intend it to apply to applications for the execution of decrees. It has since been decided in Bombay that an application by a defendant for the postponement of the sale of his property, in which he promised to pay the amount of the decree, is an acknowledgment of the plaintiff's right to execute the decree, and creates a new period of limitation; *Bapu v. Bhawansing*, P. J. 1885, p. 183; *Venkatrao v. Bijesing*, I. L. R. 10 Bomb. 108. Where a decree has been transferred to the Collector for execution, and the judgment-

creditor and debtor join in an application to the Collector stating that a certain sum had been paid on account of the decree, and that a certain sum was still due for the payment of which arrangements had been made, such application is a sufficient acknowledgment under this section; *Muhammad Said v. Payag*, I. L. R. 16 All. 228.

In the following cases acknowledgments have been held to be good acknowledgments of debts or rights:—

A letter promising to pay the debt off by instalments, and asking to be let off the interest; *Shah Mukhun v. Imtiazood*, 10 Moore I. A. 362.

A debt recited as due to the plaintiff in a deed of sale executed by the defendant; *Madhusudan v. Brajanath*, 6 Ben. L. R. 299.

An attestation by the defendants as correct of a record-of-rights prepared at a settlement with them in which they were described as mortgagees, although it did not mention the name of the mortgagors; *Daiu Chand v. Sarfraz*, I. L. R. 1 All. 117.

Endorsement on a decree by the judgment-debtor as follows:—I, G, judgment-debtor of this decree, have paid, &c.; *Janki Prasad v. Ghulam Ali*, I. L. R. 5 All. 201; for a similar case see *Bhagat v. Chint*, Panj. Rec. No. 28 of 1885.

Application to postpone a sale in execution of a decree; *Ramhit v. Satgur*, I. L. R. 3 All. 247; followed in *Ram Coomar v. Jakur Ali*, I. L. R. 8 Calc. 716; but not followed in *Ruma Rau v. Venkatesa*, I. L. R. 5 Mad. 171 (F. B.); see, also, *Venkatrao v. Bijesing*, I. L. R. 10 Bomb. 108.

Recital of the existence of a decree in an agreement made to pay it off; *Fateh Muhammad v. Gopal Das*, I. L. R. 7 All. 424.

Balance struck and carried to new account as “due for balance of old account”; *Nahanibai v. Nathu Bhai*, I. L. R. 7 Bomb. 414; *Rancholdas v. Jeychand*, I. L. R. 8 Bomb. 405; see, also, *Dukhi v. Mahomed*, I. L. R. 10 Calc. 284, at p. 287, and the cases cited there.

Statements in a plaint of the jural relation between the plaintiff and the defendant; *Dharma v. Govind*, *I. L. R.* 8. *Bomb.* 102.

*Quære*, whether a deposition of a defendant in another suit signed by him is an acknowledgment sufficient to satisfy the requirements of this section. On this point the Court was divided in opinion; *Venkata v. Parthasaradhi*, *I. L. R.* 16 *Mad.* 220.

A letter acknowledging liability on a dishonoured hundi drawn for the debt sued for; *Raman v. Vairavan*, *I. L. R.* 7 *Mad.* 392.

An account with one item only on the debit side bearing the mark of the debtor; *Tribhovan v. Amina*, *I. L. R.* 9 *Bomb.* 516.

Admission of bond debt in the answer of the executors of the obligor in a suit to which the obligee was not a party; *Moodie v. Bannister*, 4 *Drew.* 432.

Request by a debtor to his creditor to send him in his account; *Quincey v. Sharpe*, 1 *Ex. D.* 72.

A request by solicitors newly appointed to receive from the old solicitors an account of their dealings with the client's land, &c., and for particulars of any unsettled bill of costs; *Curwen v. Milburn*, 42 *Ch. D.* 424.

The following have been held *not* to be sufficient acknowledgments:—

A memorandum of payments made and endorsed on a bond and signed by the defendant; *Gora Chand v. Lokenath*, 8 *W. R.* 335; but see *Bheemangowda v. Feranah*, 7 *Mad. H. C. Rep.* 308; in which case, however, it would seem that the only point to be decided was whether a signature by a mark was sufficient.

“Remittance of £40 to old account”; *Shearman v. Fleming*, 5 *Ben. L. R.* 619.

A number of letters from which it might possibly be inferred that there was some debt due, without any definite admission of indebtedness; *Rogers v. Montriau*, 6 *Ben. L. R.* 550.



A plaint in a suit brought by the debtor to compel the creditor to receive instalments, setting out the provisions of a bond, and stating that instalments had been tendered and refused; *Narayanappa v. Bhaskar*, 7 *Bomb. H. C. Rep. A. C. J.* 125.

The fact that an acknowledgment of a *pecuniary* liability is found in an unregistered deed relating to land does not prevent the deed being given in evidence in respect of the pecuniary liability; *Nundo Kishore v. Ramsookhee*, *I. L. R.* 5 *Calc.* 215; *Khushal v. Behari Lall*, *I. L. R.* 3 *All.* 523. If, however, the acknowledgment had been in respect of a right in immoveable property the provisions of the Registration Act would have to be taken into consideration, and its admissibility would depend upon whether it was required to be registered or not; *Faki v. Khotu*, *I. L. R.* 4 *Bomb.* 590.

*Before the period of limitation prescribed.*—Under Act IX of 1871, this meant that the acknowledgment must be signed before the period prescribed by that Act elapsed; *Chunilal v. Tribhovani*, *I. L. R.* 5 *Bomb.* 638; *Rumji v. Dharma*, *I. L. R.* 6 *Bomb.* 683; and this section did not apply to cases falling under special or local laws, but under the present Act, the acknowledgment must be signed either within the period prescribed by this Act, or by the special or local Act which governs the particular case; *Parbuttinath v. Tejomooy*, *I. L. R.* 5 *Calc.* 303. The prescribed period is the period prescribed by the Act which governs the suit, and not by the Act which was in force at the time the acknowledgment was signed; *Mukkani v. Manan*, *I. L. R.* 5 *Mad.* 182; unless the claim was already barred under the former Act. When an acknowledgment is signed before the period of limitation expires a new period of limitation commences from the date of the acknowledgment, and a fresh acknowledgment within that new period is an acknowledgment within a period prescribed for a suit, and is itself the starting point of another new period of limitation; *Atmaram v. Gorind*, *I. L. R.* 11 *Bomb.* 282; following *Moheshlal v. Busunt Kumaree*, *I. L. R.* 6 *Calc.* 340; *Venkataratna v. Kamayya*, *I. L. R.* 11 *Mad.* 218.

In cases which fall under the Contract Act IX of 1872, Sect. 25, Cl. 3, the document need not be given before the period of limitation has expired, but under that section the suit is not brought on the original cause of action, as under this section, but on the *new contract*, for which the barred debt would be a sufficient consideration, and the evidence in the suit must shew that under the new contract, the plaintiff is entitled to recover; *Watson v. Yates*, *I. L. R.* 11 *Bomb.* 580; see the remarks on the English law at the commencement of the notes to this section. A document which does not amount to a promise to pay, or constitute a new contract, may amount to an acknowledgment, but in that case it will not affect any right or claim which was barred at the time it was made; *Harkishen Das v. Pir Baksh, Panj. Rec.* No. 36 of 1886.

*Signed.*—It has been ruled that an acknowledgment sealed is not signed; *Lachman Persad v. Rumzan Ali*, 8 *W. R.* 513; but, *quære* whether this is good law. The contrary was ruled in *Gur Sahai v. Sadik, Panj. Rec.* No. 185 of 1883. Neither Act I of 1868, nor the Evidence Act contains any definition of what constitutes “signing,” but the Civil Procedure Code, 1882, explains it as including a mark, and “stamping” with the name of the person referred to, which would in fact be “sealing.”

Initials are a good signature; *Ammayee v. Yalumabai*, *J. L. R.* 15 *Mad.* p. 264.

An acknowledgment was written by direction of the debtor, and, as he was unable to write, he put his mark to it. This was held to be a good signature; *Bheemangouda v. Eeranah*, 7 *Mad. H. C. Rep.* 358. The writing of certain words by the defendant at the top and bottom of a letter which purported to come from him but was written by another person, is a signature when the writing of such words by persons of the class to which the debtor belongs is the usual way of shewing that the letter is to be regarded as written by their authority; *Gangadharrao v. Shidramappa*, *I. L. R.* 18 *Bomb.* 586.

It is immaterial where the signature is placed, it need not be formally subjoined to the writing but may appear in the heading

of a letter or an account, provided it sufficiently appears that what follows is written under the authority of that heading; *Muhammad v. Venkatarayar*, 2 *Mad. H. C. Rep.* 79; *Mathura Das v. Babu Lal*, *I. L. R.* 1 *All.* 688; *Andaji v. Dulabh*, *I. L. R.* 5 *Bomb.* 88; *Jekisan v. Bhowsar*, *ib.* 89; *Moheshlal v. Busunt Kumaree*, *I. L. R.* 6 *Calc.* at p. 352; *Balkrishna v. Govind*, *I. L. R.* 7 *Bomb.* 518; *Knight v. Crockford*, 1 *Esp.* 190; *Lobb v. Stanley*, 5 *Q. B.* 574; *Johnson v. Dodgson*, 2 *M. and W.* 658; *Durrell v. Evans*, 1 *H. and C.* 174; *Mahalakshimibai v. Nageshwar*, *I. L. R.* 10 *Bomb.* 71; but *Weir, J.*, has held that where a man wrote his will, at the beginning of which his name appeared, with his own hand, and therein acknowledged a debt, that such acknowledgment was not sufficiently signed; *Ramasami v. Muttusami*, *I. L. R.* 15 *Mad.* 380.

*Agent, duly authorized.*—The words “duly authorized in that behalf” do not mean specially or expressly authorized. They are merely the proper description of an agent acting within the scope of his powers, ordinary or special; *Jodh Raj v. Chuttan Lal*, *Panji. Rec.* No. 7 of 1890. B’s *gumasta* by his master’s order wrote a letter which was headed, “written by B to S” acknowledging the debt, and B finished the letter in his own handwriting, but there was no signature at the end. It was held that the heading and letter were written by a duly authorized agent; *Mathura Das v. Babu Lal*, *I. L. R.*, 1 *All.* 683.

A *dewan* who always writes his master’s letters, the master never writing them himself, is a duly authorized agent; *Mohesh Lal v. Busunt Kumaree*, *I. L. R.* 6 *Calc.* 340, at p. 351; and so is, possibly a *mohurrir*, in the absence of the *dewan*; *ib.*

The balance of an account written by a person at the request of an illiterate debtor in the debtor’s name, but signed by the writer in his own name, is written by a duly authorized agent; *Hemchund Kuber v. Raji Haji*, *I. L. R.* 7 *Bomb.* 515. Certain debtors authorized a writer to write in the creditor’s book of accounts, “*Lekha B. V. and R. (debtors)*” followed by what was sufficient as an acknowledgment, but the debtors did not sign, seal, or mark the book; it was held that this was a sufficient

signature; *Ram Ditta v. Ibrahim*, *Panj. Rec.* No. 122 of 1889. See also *Jeba v. Chaman*, *ib.* No. 16 of 1891.

An application signed by a pleader expressly authorized to make the application is signed by a duly authorized agent; *Ramhit v. Satgur*, *I. L. R.* 3 *All.* 247; so is a plaint similarly signed; *Dharma v. Govind*, *I. L. R.* 8 *Bomb.* at p. 103.

The question whether the manager of a Hindu family is duly authorized to acknowledge a debt not already barred, so as to give a new starting point for limitation against the family, has not been satisfactorily settled. In *Kumarasami v. Pala Nagappa*, *I. L. R.* 1 *Mad.* 385, it was decided that he was not generally or specially authorized to do so; and this case seems to have been approved of in *Naranji v. Bhagwandas*, *P. J.* 1881, p. 238; but in a Full Bench decision in which the former case was considered the Madras High Court held that a manager of a Hindu family has the same authority to acknowledge, as to incur, debts; *Chinnaya v. Gurunathan*, *I. L. R.* 5 *Mad.* 169, but the decision of this point was not necessary for the decision of the case, which turned upon whether a manager could revive a debt already barred. It would seem strange if a manager could not continue the existence of, as well as create, a debt. Suppose, just before the limitation for a valid debt incurred for family purposes ran out, the creditor threatened to sue and sell off the family property if the debt were not paid or acknowledged; the manager would have full power to incur a new debt for the purpose of paying off the old one, and the new debt would be the debt of the family. Why then, instead of incurring a new debt, should he not create a new liability in respect of the old debt, by passing an acknowledgment, and still bind the family? The High Court in Calcutta have ruled that as between the members of a joint family any one or more may of course be authorized to act as their agent or agents in any business transaction; *Ramsebuk v. Ramlall* *I. L. R.* 6 *Cal.* 826, and this authorization may be express or implied by the ordinary course of their dealings. The High Court at Bombay has since held that, in the absence of evidence to the contrary, the manager of a Hindu family is their duly authorized agent to acknowledge a debt *not already barred*;

*Bhasker v. Vijnlal*, I. L. R. 17 Bomb. 512; *Sobhanadri v. Sriramu-lu*, I. L. R. 17 Mad. 221. So where the defendants (minors) carried on a family business through two guardians, but, as a matter of fact, one did the whole work of the business and signed an acknowledgment in favour of the plaintiff; it was held that his signature bound the defendants; *Jodh Raj v. Chuttan Lal Panj. Rec.* No. 7 of 1890. A Hindu widow can revive a barred debt; *Kondappa v. Subba* I. L. R. 13 Mad. 189. See, also, *Bhala v. Parthu*, I. L. R. 11 Bomb. 320; *Blau Babuji v. Gopala ib.* 325; *Chimnaji v. Dinkar*, I. L. R. 2 Bomb. 67.

The guardian of a minor, as such, has no authority to make a binding acknowledgment of a debt so as to bind the minor; *Wajibun v. Kadu Buksh*, I. L. R. 13 Calc. 292; *Azuddin v. Lloyd*, 13 C. L. R. 112. A guardian appointed under Act XL of 1858, carrying on a family business, can sign an acknowledgment so as to bind minors; *Behari Lal v. Chuttan Lal, Panj. Rec.* No. 25 of 1886.

The signature of an agent is of no avail if he has ceased to be an agent at the time of signature; *Dinomoyi v. Roy Luchmiput*, 7 I. A. 8.

*New period of limitation*—starts from the date of the acknowledgment, therefore it is necessary that the date on which the acknowledgment is given should appear in the writing or be proved *aliunde*; *Rogers v. Montriou*, 6 Ben. L. R. 550, at p. 554; and the period is a new one entirely and not an extension of the old one; *Venkataramayyar v. Kothandaramayyar*, I. L. R. 13 Mad. 135.

*Oral evidence*.—The form of the second clause of this section raises some difficulty in determining what the Legislature meant by it. Under Act IX of 1871, if the acknowledgment was undated, oral evidence might be given of the date on which it was signed, but if it was alleged to have been lost or destroyed, oral evidence could not be given of its contents. After the word “signed” there was a full stop, and the latter provision formed an independent sentence by itself. The present section replaces the full stop by a semicolon and leaves out the words “when it is alleged to have been destroyed or lost,” so that the last ten

words form part of a sentence relating to an undated acknowledgment. If the Legislature meant to say that oral evidence was *in no case* to be received of the contents of an acknowledgment, they have not said so; though probably, in cases where so much turns upon the actual wording of the document, it is desirable that oral evidence of the contents should be kept out, although other secondary evidence, such as a press or other copy, might be admitted. The rest of the section seems to assume that the acknowledgment is in existence, and therefore, probably in Court, and that the only defect is the want of a date, and under these circumstances oral evidence could not be given of its contents under the law of evidence, and the only thing wanted is permission to supply the date by oral evidence, which the former part of the section supplies. The last ten words, consequently seem to be of no use whatever in the section in its present form.

Under these circumstances the High Court at Calcutta has held that this section does not exclude oral or any other secondary evidence of the contents of an acknowledgment which has been destroyed or lost; *Shambhu Nath v. Ram Chandra*, I. L. R. 12 Calc. 267; followed in *Wajibun v. Kadu Buksh*, I. L. R. 13 Calc. 292; and in *Chathu v. Virarayan*, I. L. R. 15 Mad. 491. This is in accordance with the English law; *Haydon v Williams* 4 M. and P. 811; 7 Bing. 163. In Bombay it has been held that, where acknowledgments of a debt were signed by the debtor each year, and, on the signing of a fresh acknowledgment, the old one was given back to the debtor, no oral evidence of these old acknowledgments could be given so as to shew that they had been given while the debt was still unbarred; *Ziunnissa v. Motidev*, I. L. R. 12 Bomb. 268; but in this case, no evidence was given as to whether the old acknowledgments were lost or destroyed, and no reference was made to the two Calcutta cases.

*Explanation 1. Sufficiency of acknowledgment.*—Where there is an acknowledgment of some debt due in writing, oral evidence is admissible to shew to what debt the acknowledgment relates; *Womesh Chunder v. Sageman*, 12 W. R., O. App. 2. Where an account existed between the plaintiff and defendants which was

referred to an arbitrator in the first instance, and the defendants put in a memorandum of disputed items signed by them in which they denied that any balance was due by them, but admitted that accounts must be taken, and that they were liable if any balance was found to be due by them to the plaintiff, it was held that this was a sufficient acknowledgment; *Sitayya v. Rangareddi*, *I. L. R.* 10 *Mad.* 259; the denial that anything would be due to the plaintiff is immaterial; *France v. Sympson, Kay*, 678; *In re River Steamer Co.*, *L. R.* 6 *Ch.* p. 832.

If a person who has signed a joint and several bond, apparently as principal, acknowledges that he is liable as surety on that bond, it is a sufficient acknowledgment within this section; *Uncovenanted Service Bank v. Grant*, *I. L. R.* 10 *All.* 93.

*Address of acknowledgment.*—The last clause of explanation 1, which is in accordance with the decisions in *Dur Gopal v. Kashbeeram*, 3 *W. R.* 3; *Ahiloji v. Harichand*, 5 *Bomb. H. C. Rep. A. C. J.* 176; *Unicha v. Valia*, 4 *Mad. H. C. Rep.* 359; *Ali Hoosein v. Ram Dyal*, 3 *N. W.* 78; and *Esree Singh v. Bisheshur*, 3 *Agra*, 255; settles a point which is still open in England; where in the cases of *Mountstephen v. Brooke*, 3 *B. and Ald.* 841; and *Halliday v. Ward*, 3 *Camp.* 32; and *Stansfeld v. Hobson*, 16 *Beav.* 237, affirmed in appeal, 3 *De G. M. and G.* 620; it was held that an acknowledgment to a third person was sufficient; but in the cases of *Godwin v. Colley*, 4 *H. and N.* 373; and *Grenfell v. Girdlestone*, 2 *Y. and C.* 662; the contrary was held. At common law, however, before Lord Tenterden's Act, an acknowledgment to a stranger was sufficient. This explanation shews that the acknowledgment is contemplated as addressed to some one, consequently an entry in the book of the debtor does not amount to an acknowledgment under this section; *Mahalakshmi Bai v. Nageshwar*, *I. L. R.* 10 *Bomb.* 71; *Sargent, C. J.*, in this case speaks of the acknowledgment being contemplated as addressed to the creditor, but this explanation shews that this is not necessary; it does not require that an acknowledgment should be addressed to any one, but only provides that, *if addressed*, it need not be addressed to the creditor; an acknowledgment in a will is sufficient; *Uppi*

*Haji v. Mammavan*, I. L. R. 16 *Mad.* 866. The acknowledgment must, however, be one of liability to the person who is seeking to take advantage of it, or to some person through whom he claims; *Mylapore v. Yeo Kay*, I. L. R. 14 *Cal.* 801 (P. C.).

*Stamps.*—By Art. 1 Sched. I, of Act I of 1379, the acknowledgment of a debt exceeding twenty rupees in amount, written or signed by or on behalf of a debtor in order to supply evidence of such debt in any book (other than a banker's pass book) or on a separate piece of paper, when such book or paper is left in the creditor's possession, requires a stamp of one anna, which by Sect. 11 of that Act must be affixed and cancelled at or before the time of execution so that it cannot be used again, otherwise the document will be deemed to be unstamped. Although an unstamped balance of an account struck by a debtor in his own handwriting cannot be acted upon as an acknowledgment of a particular sum being due, it may be used as shewing a liability in respect of transactions between the parties, so as to give a new period of limitation; *Fatechand v. Kisan*, I. L. R. 18 *Bomb.* 614. Whether a letter by which an acknowledgment of a debt is evidenced requires a stamp or not depends in each case upon the intention of the writer, to be ascertained by looking to the surrounding circumstances of the case, and what was taking place when the document was written; and in case of any doubt on the applicability of the Stamp Act, its provisions should be construed in favour of the subject; *Bishambar v. Nand Kishore*, I. L. R. 15 *All.* 56.

**Sect. 20.** *Effect of payment of interest; of part payment of principal; of receipt of produce of mortgaged land.*—When interest on a debt or legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf:

Or when part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf:



**A new period of limitation, according to the nature of the original liability, shall be computed from the time when payment was made:**

**Provided that, in the case of part-payment of the principal of a debt, the fact of the payment appears in the handwriting of the person making the same.**

**Where mortgaged land is in the possession of the mortgagee, the receipt of the produce of such land shall be deemed to be a payment for the purpose of this section.**

*Notes.*

Under Act XIV of 1859 part-payment did not give rise to a new period of limitation; see *Raja Ishvara v. Richardson*, 2 *Mad. H. C. Rep.* 84; and other cases on the same point. Payment, as giving rise to a new period of limitation, was first introduced by Act IX of 1871, Sect. 21, which is in the same terms as the present section; except that under the former Act in the case of part-payment of principal the debt must have arisen from a contract in writing, which is not the case now; and the last clause of this section is new.

*Prescribed period.*—The prescribed period is that prescribed for limitation, see the notes on these words under the last preceding section. The words in this section are simply “the prescribed period,” and thus differ from those used in Sect. 19, which are “the period prescribed for a suit or application,” but the general tenor of the Act would seem to indicate that these two terms were intended to apply to the same period. In *Tariney Churn v. Shaikh Abdur*, 2 *C. L. R.* 346, it was, however, held that prescribed period meant the period prescribed for the repayment of the loan, which would render the whole section nugatory, as, in ordinary cases, no debtor would make a part-payment before the time when the loan became due. This case is either imperfectly reported, or else wrongly decided; and was dissented from in *Ramsebuk v. Ramlall Koondoo*, 1 *L. R.* 6 *Calc.* at p. 826, where it was held that “prescribed period” means the prescribed period of limitation and not the period prescribed for the payment of the

debt. Where a series of payments or acknowledgments have been made, each within the new period arising from the previous acknowledgment or payment, the debt is kept alive until the expiration of the period prescribed for a suit or application from the last acknowledgment or payment; *Moheshhal v. Busunt Kumaree*, I. L. R. 6 Cal. 340; *Atmaram v. Govind*, I. L. R. 11 Bomb. 282; *Venkataratnam v. Kamayya*, I. L. R. 11 Mad. 218.

*Payment.*—A mere payment of money does not take the case out of the statute, it must appear that the payment was made on account of the debt sued for, and that it was a payment of a smaller sum on account of a larger sum; *Tippets v. Heane*, 1 C. M. and R. 252; *Nash v. Hodgson*, 6 DeG. M. and G. 474, at p. 482. If it did not appear to have been made on account of a larger sum it might have been payment in full, which would not amount to an acknowledgment of anything being thereafter due; and the payment must be an acknowledgment by the person making it of his existing liability, and of the title of the person to whom the payment is made; *Harlock v. Ashberry*, 19 Ch. D. 539.

Where there are separate items of debt of the same kind, and a demand is made for them all at the same time, and a bill is given on account, there is evidence to go to a jury of a payment on account of all the items; *Walker v. Butler*, 6 E. and B. 506; but where there are two clear and distinct debts, the case is not taken out of the statute by a payment not appropriated to either; *Burn v. Boulton*, 2 C. B. 476; though where there are two distinct debts claimed by the plaintiff, and the defendant denies the existence of one, there is evidence to go to a jury that a payment made by him was made on account of the other; *ib.*

Where it has been agreed between the debtor and the creditor that the latter shall receive goods in part-payment of his claim, the delivery of such goods to him operates as part-payment; *Hooper v. Stephens*, 4 A. and E. 71; so, too, where the defendant agreed to maintain the plaintiff's child for, *inter alia*, the interest payable by him on a note signed by him, the fact that he did so maintain the child amounts to a part-payment; *Bodger v. Arch*,

10 *Exch.* 338; followed in *Doming v. Antona*, *P. J.* 1889, p. 39, in which it was held that the execution of a bond for interest due on a mortgage was a payment of interest.

Where trustees committed a breach of trust in making a certain investment, in consequence of which a portion of the trust money was lost, the payment by them to the tenant for life of the interest on the investment does not amount to an acknowledgment that anything is due by them to the tenant for life in respect of the capital which is lost; *Somerset v. Earl Poulett*, [1894] 1 *Ch.* 281.

In England the payment need not be made before the debt is barred. A debtor, unable to pay his debts as they became due out of his own money, paid, within three months of his being adjudged bankrupt, part of a debt barred by the Statute of Limitations with the object of renewing the debt and enabling the creditor to prove in the bankruptcy for the balance due. The debt up to the date of such payment on account had always been treated by the debtor and creditor as an existing debt and one which should ultimately be paid. It was held that there was a sufficient part-payment to take the debt out of the operation of the Statute; *In re Lane*, 23 *Q. B. D.* 74.

*To whom payment is to be made.*—It is perfectly settled that payment must be to the creditor, or some one who is his agent: payment to a stranger will not take the case out of the Statute; *Stamford Banking Co. v. Smith*, [1892], 1 *Q. B.* 765; following *Tanner v. Smart*, 6 *B. & C.* 603.

*By whom payment to be made.*—The principle laid down by the section is, that the payments must be made by the debtor or his duly authorized agent, consequently there is no part-payment under this section if the creditor simply credits the debtor with sums realized by him from third parties in the ordinary course of business; *Narronji v. Magneram*, *I. L. R.* 6 *Bomb.* 103; on the same principle money realized by a sale in execution cannot be considered as part-payment under this section; *Rughonath v. Shiromonee*, 24 *W. R.* 20; *Bemul v. Ikbāl*, 25 *W. R.* 249; *Ramchundra v. Devba*, *I. L. R.* 6 *Bomb.* 626. The mere crediting

by the debtor in his books of interest to the account of the creditor and in his presence does not amount to payment of interest; *Iohhalal v. Natha*, *I. L. R.* 13 *Bomb.* 338. Where a first mortgagee sold property, and the proceeds were received by his solicitor who paid over to him sufficient to discharge his mortgage, and represented that he had paid over the balance to the second mortgagee, but did not do so, and continued payment of interest to the latter as if the second mortgage was in existence; it was held that such payment did not keep the second mortgage alive as against the first mortgagee, as they were not made by the solicitor as his agent; *Thorne v. Hemel* [1893], 3 *Ch* 530. Payment of interest by a principal keeps a debt alive against a surety; *Allison v. Friaby*, 43 *Ch. D.* 106. Where a firm owes a debt, and, on one of the partners retiring, the remaining partners undertake to pay it, the payment of interest by the remaining partners to the creditor keeps alive the debt against the retiring partner, whether the creditor was aware of the agreement or not, provided there has been no novation of contract; *Tucker v. Tucker* [1894], 1 *Ch.* 724.

It is not necessary that the agent should be authorized in writing to make a payment, nor that he should be expressly authorized, it is sufficient that authority is implied; *Birjmohum v. Rudra Perkash*, *I. L. R.* 17 *Calc.* p. 951.

This section requires something more than the English law does, viz., that interest must be paid *as interest*, *i. e.*, it must be distinctly stated at the time of payment that it is paid on account of interest, or else there must be evidence from which the payment as interest may be distinctly inferred, and if so, the mere proof of payment is sufficient. Principal must always be paid *as principal*, but the *fact* of the payment must appear in the handwriting of the person making the same, *i. e.*, of the debtor or his duly authorized agent; consequently, if a lump-sum be paid by a debtor to his creditor, and no intimation be given as to how it is to be appropriated, and no memorandum be made by the payer of its payment, it cannot be treated as part-payment of principal, because of the want both of appropriation and of a memorandum, and it cannot be treated as part-payment of interest because it

was not paid *as such*; *Hanmantlal v. Rambabai*, *I. L. R.* 3 *Bomb.* 198.

The fact of the *payment* of principal is all that need appear in writing, not the appropriation; *Jada Ankamma v. Nadimapalli*, *I. L. R.* 6 *Mad.* 281; and it is sufficient if the payer affixes his signature to an endorsement made by another person; *Narsingh Das v. Bachatar*, *Panj. Rec.* No. 99 of 1884; or his mark; *Madathushi v. Singara*, *I. L. R.* 7 *Mad.* 55; *Ellappa Nayah v. Anamalai Goundan*, *ib.* 76. The fact that the writing evidencing the payment was not made till after the period of limitation has expired is immaterial, so long as the payment itself was within time; *Venkatasubbu v. Appasundram*, *I. L. R.* 17 *Mad.* 92. Where the only evidence in the handwriting of the debtor of the part-payment of the principal of a debt was the endorsement of a cheque by the debtor to the creditor, it was held that such endorsement did not satisfy the requirements of this section; *Mackenzie v. Tiruvengadathan*, *I. L. R.* 9 *Mad.* 271. Where a judgment-debtor paid money on account of a decree and endorsed it, "I, G, the judgment-debtor of this decree, having myself paid Rs.—, have endorsed this payment on the decree in my own handwriting," it was held by *Mahmood, J.*, that it was evidence of a part-payment of principal under this section; *Janki Prasad v. Ghulam Ali*, *I. L. R.* 5 *All.* 201. A certificate to a Court by a judgment-creditor of payment made by the judgment-debtor will not bring the case under this section, as the payments do not appear under the handwriting of the payer; *Chajju v. Gulab*, *Panj. Rec.* No. 61 of 1886. In *Permanandas v. Vallabdas*, *I. L. R.* 11 *Bomb.* at p. 513, it was assumed throughout that part-payment properly made would keep a decree in force, and it was further held that such payments were operative for that purpose, although not certified by the judgment-creditor at the proper time, but that the creditor must, however, certify the payments before execution is issued. It has, however, been held that the word "debt" does not include a liability for which a decree has been obtained, but only one for which a suit can be brought; *Kally Prosonno v. Heera Lall*, *I. L. R.* 2 *Calc.* 468: but this ruling has been doubted in *Ramhit v. Satgar*, *I. L. R.* 3

*All.* 247 (*F. B.*); and it is to be noted that "judgment-debt" is a term in constant use, and that the application of the word "debt" is not limited by this section itself to claims for which suits have yet to be brought. In *Shripatray v. Govind*, *I. L. R.* 14 *Bomb.* 390; following *Billings v. The Uncovenanted Service Bank*, *I. L. R.* 3 *All.* 781; and *Heera Lall v. Dhunput Singh*, *I. L. R.* 4 *Calc.* 500; it was held that a judgment-debt was a debt within Sect. 25, Cl. 3, of the Contract Act.

A payment of interest as such made before Act IX of 1871 came into force, the suit having been brought while it was in force, saves limitation; *Teargarga v. Mariappa*, *I. L. R.* 1 *Mad.* 264; but under this Act, it would depend upon whether the claim in respect of which the payment was made, was barred or not at the time of payment under the Act then in force; see Sect. 2.

This section provides only for payment by the person *liable to pay the debt*, but not for the case of a debt charged on or payable out of an estate, the person in possession of which is not liable to pay the debt himself, but is bound to keep down the charge or the interest thereon. In England it has been held that the payment of interest on a debt by the tenant for life of a portion of the assets out of which the debt was payable kept alive the debt as against the remainderman; *Hollingshead v. Webster*, 37 *Ch. D.* 651. In the case of a mortgaged estate, the hand of the tenant for life is the proper hand to make the payment of interest and payment by him will keep alive the right of action on the covenant of the owner of the estate; *Dibb v. Walker*, [1893] 2 *Ch.* 429.

*Double capacity of payer, &c.*—Where a person fills two characters, such as beneficial devisee and executor, a payment of interest will be attributed to both characters and not one only, for the moral obligation does not attach more to one character than to the other; but it is different where the obligations of the characters which he holds are entirely distinct as where he is personally liable as debtor, and is answerable also as the executor or trustee of another; for he then represents two persons, and the question in such a case is by whom the promise was made. Thus the pay-

ment of interest by executors, they also being trustees of the testator's real estate, not subject under the will to debts, does not necessarily keep the debt alive as against the real estate, because although the executors and trustees were the same persons, they filled different characters; *Fordham v. Wallis*, 10 *Hare*, 217. A and B were partners, and gave a note in the name of the firm. A died leaving B his sole executor, and no proceedings were taken against the estate for more than six years; but B, who had continued the business, made payments of interest and then became bankrupt. It was held that the payments were made in his character of surviving partner, and not as executor of A, and that consequently the debt was barred as against the estate of A; *Thompson v. Waithman*, 3 *Drew*. 628.

*Mortgagee in possession.*—Under the old law the receipt of the produce of land did not amount to a payment by the debtor, and where a mortgagee in possession had leased the mortgaged land to the mortgagor, it was held that the payment of rent by him under the lease did not give rise to a new period of limitation, because such payment cannot be looked upon as a payment of interest as such; *Ummer Kuti v. Abdul Kadar*, 1. *L. R.* 2 *Mad.* 165 and 3 *Mad.* 57. So, too, in England it has been held that payment of rent by tenants of the mortgaged property to the mortgagee, on notice by him, will not operate to extend the period of limitation, as it is not a payment by the person liable; *Harlock v. Ashberry*, 19 *Ch. D.* 539.

A mortgagee in possession is one who is in possession of the rents and profits of the estate or a portion thereof under his title as mortgagee. Nothing could evidence his being in possession more strongly than the fact that the mortgagor accepts a lease from him, consequently the foregoing cases would now come under the last clause of this section, for rent is surely the produce of the land, though the Madras Court seemed to think that the clause in the present section related only to usufructuary mortgages, whereas its terms relate to all cases in which the mortgagee is in possession, and at whatever time or under whatever terms he may have taken possession. The receipt of the produce of land held under a mortgage which ought to be registered, but

is not, cannot be deemed to be payment under this section; *Pichandi v. Kandasami*, I. L. R. 7 *Mad.* 539.

Where the same person is entitled beneficially to the interest on a mortgage, and to the rents of the mortgaged property, although the two rights are legally vested in two different sets of persons as trustees, and no payment has been made by one set to the other, but the beneficiary has been in receipt of the rents of the land, that is sufficient to take the case out of the Statute of Limitations; *Popham v. Booth*, 35 *Ch. D.* 607; following *Burrell v. Earl of Egremont*, 7 *Beav.* 205.

This clause of the section only extends the time during which the mortgagee can enforce his rights against the mortgagor, but does not extend the time during which the mortgagor is entitled to redeem; *Khilanda v. Jinda*, *Panj. Rec.* No. 37 of 1883; followed in *Ganu v. Krishnaji*, P. J. 1893, p. 318; and *Chinto v. Balkrishna*, *ib.*, p. 346.

**Sect. 21.** *Joint contractors, &c., not affected by act of one.*—Nothing in Sections 19 and 20 renders one of several joint contractors, partners, executors, or mortgagees chargeable by reason only of a written acknowledgment signed, or of a payment made by, or by the agent of, any other or others of them.

#### *Notes.*

This section is an elaboration of a proviso in Sect. 4 of Act XIV of 1859, and of Explanation 2 to Sect. 20 of Act IX of 1871. In England, before the passing of the statute 9 Geo. IV, c. 14, both acknowledgments and payments by one of several co-debtors, &c., kept alive the debt against all, but section 1 of that Act introduced a provision similar to that contained in this section in respect of *acknowledgments* by one of several joint-contractors, executors or administrators; and the Mercantile Law Amendment Act, 1856, provided similarly for *payments* by one of several co-debtors or co-contractors, whether liable jointly only, or jointly and severally, or executors or administrators. Both statutes limit the exemption from chargeability by the words "by reason only," in the same way as it is limited in the present section,



but neither of the English statutes enumerates "partners" as distinct from co-debtors or co-contractors.

This section, in no way, interferes with the operation of Sects. 19 and 20, but simply requires that their principles shall be applied strictly, so that acknowledgments or payments made by one of several co-contractors, &c., shall not bind the others, *unless it be shewn*, according to the circumstances of each particular case, by evidence, or necessary implication of law, that the person acknowledging or paying was, at the time of payment or acknowledgment, the agent of the others, and that he made such payment or acknowledgment as their agent; *Gadu Bibi v. Parsotam*, I. L. R. 10 All. 418; *Ravji v. Narayendas*, P. J. 1888, p. 147; see, also, *Birjmohun v. Rudra Perakash*, I. L. R. 17 Calc. p. 951.

*Partners.*—In the case of co-partners, while the partnership exists, each partner in the absence of evidence to the contrary, is presumed to be the agent of the others to make payments on account of debts due by the firm so as to exclude the operation of the statute; because payments by any one partner are payments by the firm; but as soon as the partnership is dissolved such agency ceases unless specially reserved, and payments by one can then only be held to be payments by all on proof that such payments were actually authorized by all; *Watson v. Woodman*, L. R. 20 Eq. at p. 730; *Goodwin v. Parton*, 41 L. T. N. S. 91; *Bristow v. Miller*, 11 Ir. L. R. 461; *Premji v. Dossa*, I. L. R. 10 Bomb. 358; approved of in *Gadu Eibi v. Parsotam*, I. L. R. 10 All. 418; and *Ravji v. Narayendas*, P. J. 1888, p. 147, in which the Court held that this section did not exclude the well established presumption of law as to the agency of partners in a going concern *inter se*. A balance struck by one partner of a firm after the firm has ceased to carry on business does not bind the other partners; *Naubat Rai v. Seva Ram, Panj. Rec.* No. 140 of 1889.

*Co-debtors.*—In 1853, H as principal, and the defendant as security, gave a joint and several note to the plaintiff, payable on demand. In 1861, H made an assignment for the benefit of his

creditors, and the defendant signed and gave to the plaintiff a letter in which he consented to the plaintiff receiving a dividend under the assignment, and agreed that such receipt should not prejudice the plaintiff's claim upon him for the debt. It was held that the receipt of the dividend coupled with the letter did not amount to more than a payment by one co-debtor; *Cockrill v. Sparke*, 1 H. and C. 699.

*Consent and knowledge.*—Where a payment by one co-debtor is made with the mere knowledge and consent of the other, the latter will not lose the benefit of this section, because that amounts only to a knowledge that he was paying on his own behalf and not on her account, or by her authority; *Jackson v. Wooley*, 8 E. and B. 778.

*Mortgagor and Mortgagee.*—The acknowledgment of the title of a mortgagor by one of two mortgagees, who, on the face of the deed, were shewn to have advanced the mortgage money on a joint account as trustees, does not keep alive the right of redemption as against the whole property nor against a moiety of it; *Richardson v. Younge*, L. R. 6 Ch. 478; *Bhogilal v. Amritlal*, I. L. R. 17 Bomb. 173; neither does the acknowledgment of one of the heirs of the original mortgagee bind the others; *ib.* This was a decision under Act IX of 1871, but so far as it is quoted its principles apply to the present section.

*Executors.*—Where an acknowledgment is given or money paid by one executor, he is not thereby involved in personal liability, but is liable only to pay out of assets in his hands; and the fact of one executor only acknowledging or paying does not exonerate the testator's estate from payment of the debt, but only exonerates the non-paying executor from being chargeable as for a *devastavit* in paying over to beneficiaries assets which may have come to his hands; *Hollingshead v. Webster*, 37 Ch. D. at p. 658.

**Sect. 22.** *Effect of adding new party. Death of a party.*—When, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party:

Provided that, when a plaintiff dies, and the suit is continued by his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted by the deceased plaintiff:

Provided also, that, when a defendant dies, and the suit is continued against his legal representative, it shall, as regards him, be deemed to have been instituted when it was instituted against the deceased defendant.

#### Notes.

This is the same as Sect. 22 of Act IX of 1871, with the exception that the word "instituted" has been substituted for "commenced;" and the words "legal representative" for "representative in interest."

This is a legislative enactment of the law under Act XIV of 1859, for it had always been held under the old law that a suit was not instituted or commenced against a person until his name had been added as a defendant; *Abdul Karim v. Manji Hunsraj*, I. L. R. 1 Bomb. 295.

This section is only intended to apply where the suit is ultimately brought by or against parties other than those originally on the record; not to cases where an original party is still on the record and the only change made is that the ground on which relief against him is sought is shifted; *Saminatha v. Muthayya*, I. L. R. 15 Mad. 417; nor is it applicable to a case where a person who was properly made a defendant in the first instance because he would not join in suing is subsequently made a plaintiff by order of the Court; *Kadir Moidin v. Rama*, I. L. R. 17 Mad. 12; *Jibanti v. Gokool*, I. L. R. 19 Calc. 760; but it does apply to such last mentioned change when the person was improperly made a defendant in the first instance; *ib.*

The words of the first clause are very plain that when, after the institution of a suit, a party is *substituted* or *added* as a plaintiff or defendant the date of substitution or addition is to be deemed as regards that party the date of institution; see *Fisher v. Pearce*, I. L. R. 9 Bomb. 1; and an Appellate Court in Bombay has recognized that the words are clear in a case which might have been

one of some hardship. After a suit was filed the plaintiff sold his rights therein, and the purchaser thereupon had his name substituted for the plaintiffs. At the time of substitution the claim was barred, and the Court held that as regards the purchaser this section applied; but to avoid the hardship which would have resulted they struck out the purchaser's name and ordered the name of the original plaintiff to be *restored*, the purchaser giving security to the plaintiff against costs; *Narayanrao v. Rajya Mahomed*, P. J. 1881, p. 304. On the other hand the High Court of Calcutta evaded the section in a similar case, and allowed the purchaser to go on, remarking that "it was not necessary perhaps that the assignees should have become parties at all, but if they did so they would only continue the suit, not in substitution for, but in conjunction with, and as the representatives in interest of the plaintiffs"; *Suput Singh v. Imrit Tewari*, I. L. R. 5 Calc. at p. 724; S. C., 6 C. L. R. 62. The first clause, however, says nothing about representatives of the plaintiff, and the two latter ones only refer to representatives of deceased persons, thus excluding representatives (whatever that may mean) of living persons from counting limitation from the date of filing the suit.

In another case of hardship, *Sargent, J.*, also evaded the words of the Act. A plaintiff sued as assignee of immoveable property, but his assignment was not registered, and therefore could not be received in evidence as such. It, however, contained a power of attorney from the assignor enabling the assignee to use his name in suits. The learned Judge allowed the plaint to be amended by adding, after the name of the plaintiff, the words "in his own name and as attorney for P. D.," saying, "there might nominally be a new suit, yet virtually it would be the same. It would still be the suit of the plaintiff. I should be of opinion that no new plaintiff had been introduced within the meaning of the Limitation Act"; *Gunput Pandurang v. Aderji Dadabhai*, I. L. R. 8 Bomb. at p. 321. In appeal, the Court did not accept the ruling of the Court below on this point, but adjourned the appeal to allow the respondent to get a fresh assignment from P. D. which he did. It may be remarked that the plaint as amended was not in accordance with

the ordinary practice of pleading ; it should have run "A. D. and P. D. by his attorney A. D.," and then certainly a new plaintiff would have been introduced ; as it stood, A. D. personally and A. D. as an attorney for another person are not the same legal persons, any more than a debtor to an estate and the same person as the executor of the will of the testator ; see *Fordham v. Wallis*, 10 *Hare* 217. A. D. as assignee would rest his claim on his right under the assignment, but in bringing the suit as attorney of P. D. he would have to sue on the right of P. D. before the assignment.

In Calcutta, where an agent sued in his own name, and subsequently, at a time when a new suit would have been barred by limitation, his principals were substituted as plaintiffs, it was held that, the suit being the same, the change of parties did not affect the question of limitation ; *Subodini v. Cumar Ganoda*, *I. L. R.* 14 *Calc.* 400. This decision, however, seems to be directly at variance with the provisions of this section and seems not to fall under the decisions in Allahabad hereinafter referred to.

The decision of *Sargent, J.*, was cited, apparently with approval, by *Scott, J.*, in *The New Fleming Spinning and Weaving Co. v. Kessowjee Naik*, *I. L. R.* 9 *Bomb.* at p. 402 ; but this was a suit to recover losses occasioned by the negligence and misconduct of the defendants, in which *Scott, J.*, allowed the insertion of a new case of misconduct causing further losses, all the parties and the main cause of action remaining as before. So, in the case of *Ram Lal v. Harrison*, *I. L. R.* 2 *All.* 832, also referred to by *Scott, J.*, where the plaint was returned for amendment, all that had to be done was to insert the locality of the property sued for. These cases stand upon a very different footing from those in which a new party has to be substituted or added.

The section only applies to new plaintiffs, and defendants made parties personally, and therefore does not apply where the same legal person remains the plaintiff or defendant, but that party has been sued by a wrong name, or through the wrong representative. Thus where a Municipal Committee, who

ought to have been sued through their President, were in fact sued through their Secretary, and application was made to substitute the name of their President, at a time when, if a new suit had had to be filed, the cause of action would have been barred, it was held that this amendment did not amount to the adding or substituting of a new defendant; *Manni Kasaundhan v. Crooke*, I. L. R. 2 All. 296. So, too, where the defendants were sued as the Elgin Mills Co., under which name they traded, and the plaint was subsequently amended by making the partners of the defendants' firm parties defendants; it was held that this was the correction of a misdescription, and not the adding of a new defendant so as to bring it under this section; *Pragi Lal v. Maxwell*, I. L. R. 7 All. 284. Where a suit was brought by a manager in the name of the firm of which he was manager, and the names of the partners were afterwards substituted for the name of the firm, it was held that this was a case of misdescription and not of misjoinder; *Kasturchand v. Sagarmal*, I. L. R. 17 Bomb. 413. Where an application was made by co-sharers to be added as parties on the 24th January 1889, and refused by the Court of first instance, but they were added by the Court of Appeal on the 3rd July 1890, it was held that the addition should be treated as operating *nunc pro tunc*; *Ramkrishna v. Ramabai*; I. L. R. 17 Bomb. 23.

*Hindu family*.—Where one member of a joint Hindu family sued in his own name to recover a joint debt, and the absence of the other members was objected to, but they were not added as plaintiffs because at that time their claim was barred, and the others expressed their willingness that the plaintiff should sue alone; it was held that such assent did not obviate the necessity of joining all the proper plaintiffs, and that without them the suit would not lie; but that, even if they had been added, the suit must have been dismissed because their claim was barred; *Kalidas v. Nathu*, I. L. R. 7 Bomb. 217; disapproving of *Boydonth v. Grish Chunder*, I. L. R. 3 Calc. 29, where the Court got over the point of limitation against two out of four proper plaintiffs by deciding the suit on the rights of all four, two only being parties. This case was, however, again dissented from in *Ramse buck v.*

*Ramlall*, I. L. R. 6 Calc. 815. But where no objection was taken by the defendant in the Court of first instance, and certain parties applied to be made co-plaintiffs, whose application was refused, it was held that *Kalidas v. Nathu* did not apply, and that the case could be proceeded with on the merits; *Shirekulli v. Ajjibal*, I. L. R. 15 Bomb. 297. See, also, *Sadulla Khan v. Bhama Mal*, Panj. Rec. No. 58 of 1882.

Where a pre-emption suit was brought against a surviving purchaser, and afterwards the representative of a deceased purchaser was added, the suit then being barred against the representative; it was held that the cause of action being one and indivisible, the whole suit must be dismissed; *Khan Muhammad v. Muhammad Jan*, Panj. Rec. No. 104 of 1882.

*Partners.*—Where one partner sues one only out of the other partners for an account of the partnership, and the omitted partners are added after the period prescribed by the Limitation Act has elapsed, the suit must be dismissed; *Ramdoyal v. Junmenjoy*, I. L. R. 14 Calc. 791; *Dallu Ram v. Nibahu Mul*, Panj. Rec. No. 8 of 1886.

Except possibly in the case of an assignment by the other surviving partners, it is not competent for one partner alone to sue for a partnership debt; and if he does so and the other partners are not added till the time of limitation has run out, the suit must be dismissed; *Imam-ud-din v. Liladhur*, I. L. R. 14 All. 525.

*Suit for possession.*—Where a suit was brought against one only of several persons who were in possession of land, and the rest were added afterwards, although the claim against them was then barred, it was held that the suit must be dismissed against the added parties; *Obhoy Churn v. Kritartha*, I. L. R. 7 Calc. 284. See, also, on a similar point, *Court of Wards v. Ganga Prasad*, I. L. R. 2 All. 107; and *Habib Ullah v. Achaibur*, I. L. R. 4 All. 145.

Where the purchaser of the interest of A in land sues the representatives of A for possession of the land itself within time but subsequently has to add the names of alleged co-sharers as defendants at a time when limitation has run in their favour, he

is still entitled to a decree for joint possession with the added defendants unless they have been in sole possession of the land to the exclusion of A and his representatives; *Krishnaji v. Vithu*, I. L. R. 18 Bomb. 505.

*Who are parties.*—Persons named as plaintiffs on the record are parties from the filing of the suit, although only one of them signs and verifies the plaint, and the fact that a Court subsequently passes an order making the other persons plaintiffs does not affect their real position; *Bungsi v. Buddan*, I. L. R. 7 Calc. 580 (P. C.).

*Appellants and respondents.*—This section applies only to plaintiffs and defendants, not to appellants and respondents, as there is no Act which makes the former terms include the latter, therefore where a party to a suit is not made a respondent to an appeal and the Court orders him to be made a respondent, under Sect. 559, C. P. C., he cannot object that the time for appealing against him has passed, and that, therefore, no relief can be granted as against him; *Manickya v. Borada Prasad*, I. L. R. 9 Calc. 355; followed in *Sohna v. Khalak Singh*, I. L. R. 13 All. 78; although *Mahmood*, J., seemed to think that it was opposed to the principles laid down in the case next but one mentioned. The same point was ruled in the same way in *Bindeshri v. Ganga*, I. L. R. 14 All. 154 (F. B.). Where, however, the Court below has dismissed the claim of the plaintiff against the added respondent, and the plaintiff has not appealed against such dismissal, the Appeal Court cannot reverse the decree in favour of the added respondent and pass a decree against him in favour of the plaintiff; *Ranjit Singh v. Sheo Prasad*, I. L. R. 2 All. 487. In this case *Spankie*, J., seemed to think that the word plaintiff and defendant included appellant and respondent.

**Sect. 23. Continuing breaches and wrongs.**—In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues.



*Notes.*

This section contains the provisions of Sects. 23 and 24 of Act IX of 1871 with various alterations. The first clause of the former section provided for *successive* breaches of a contract, and also for a continuing breach, the present section provides only for a continuing breach; see *Bhojraj v. Gulshan Ali*, *I. L. R.* 4 *All.* 493. The second clause, enacting that the provision in respect to successive breaches of a contract should not apply to breaches of contract to pay money by instalments, where on default of payment of one instalment the whole sum becomes payable, has also, as a matter of course, disappeared with the disappearance of the provision as to successive breaches. Section 24 of the former Act applied only to a continuing nuisance, the present section extends to any continuing wrong.

A continuing cause of action is one arising from the repetition of acts or omissions similar to those in respect of which the action is brought; *Hole v. Chard Union*, (1894) 1 *Ch.* 293. A breach of a covenant to repair is a continuing breach, because the covenant is broken every day the premises are out of repair; *Spoor v. Green*, *L. R.* 9 *Ex.* 99, at p. 111. A lessee allowing rooms to be used contrary to a covenant, when he might have prevented such user, commits a continuing breach of contract; *Doe d. Ambler v. Woodbridge*, 9 *B. and C.* 376; so does a lessee who continues a house uninsured in the manner provided for by his lease; *Doe d. Muston v. Gladwin*, 6 *Q. B.* 953; but where the lessee contrary to the terms of the lease, sublet the premises for a term, and the lessor after the commencement of that term, received rent and so waived the breach by the letting, it was held that the continuance of the tenant in possession till the end of his term was not a continuing breach of the covenant; *Walrond v. Hawkins*, *L. R.* 10 *C. P.* 342. A covenant for peaceable possession admits of a continuing breach, and is not barred so long as the breach continues; *Raju Balu v. Krishnarav Ramchandra*, *I. L. R.* 2 *Bomb.* at p. 292. Where contrary to the terms of an agreement, the defendant built his *otla* so as to cover up a gutter, it was held that the continuance of the *otla* was a continuing breach of contract; *Ladakchand v. Nathu*, *P. J.*, 1 92, p. 299. Upon failure to pay the

principal and interest secured by a bond upon the day appointed for that purpose, a breach of the contract to pay it is at once committed, and the fact that payment is not subsequently made does not constitute a continuing breach of the contract; *Mansab Ali v. Gulab Chand*, *I. L. R.* 10 *All.* 85.

A *Wajib-ul-arz* does not constitute a contract between the proprietors of particular lands in the village, and the occupancy tenants thereof; consequently there cannot be a continuing breach of the conditions of the *Wajib-ul-arz*; *Dhian v. Mehan*, *Punjab Rec.* No. 180 of 1883.

By a family arrangement between A and B, it was agreed that A should refund to N the price of certain property sold by A to N, of which a share belonged to B and of which B was put into possession under the arrangement. A having died without having paid the money, N obtained a decree against B for possession of a part of such property. Five years after N's suit, B's heirs sued A's heirs for damages for the breach of the agreement, and it was held that such breach was a continuing breach; *Imdad v. Nijabat*, *I. L. R.* 6 *All.* 457. It is difficult to understand the principle on which this case is decided. It is true that no time was mentioned for the payment by A to N, but would it not be held that the payment should have been made at once, or at any rate within a reasonable time? If A had not made it before her death, would not that have amounted to a breach? or, at any rate, had there not been a breach when N obtained her decree against B? In either case the claim of B's heirs was barred.

Purchasers of certain land agreed to pay the vendors certain fees annually, and in default of payment, the vendors should be entitled to the proprietary right in a certain portion of the land. The purchasers never paid any of such fees, and it was held that this was not a continuing breach of contract, though there might have been successive breaches of contract; *Bhojraj v. Gulsham*, *I. L. R.* 4 *All.* 493.

A trespass continues to be such from the moment the trespasser enters until his possession comes to an end; *Narasima v. Ragupathi*, *I. L. R.* 6 *Mad.* 176; and a plaintiff would be entitled to

rely upon the last act of trespass as constituting a cause of action, unless the defendant had acquired an indefeasible right by user; *Ramphul v. Misree*, 24 W. R. 97.

The disturbance of a right of ferry is a continuing nuisance; *Nityahari v. Dunne*, I. L. R. 18 Calc. p. 664.

Obstructions to the flow of water in a channel which are permitted to remain, or the diversion of water from a channel, are continuing nuisances, in which the cause of action accrues *de die in diem* so long as the obstructions are allowed to continue; *Ponnusawmi v. Collector of Madura*, 5 Mad. H. C. Rep. 6; *Rajrup Koer v. Abul Hossein*, I. L. R. 6 Calc. 394, at p. 404 (P. C.); *Subramaniya v. Ramchandra*, I. L. R. 1 Mad. 335; *Punja Kuvarji v. Bai Kuvar*, I. L. R. 6 Bomb. 20; *Vinayek v. Bhiwa*, P. J. 1886, p. 79.

The refusal of a wife to return to him and allow him the exercise of his conjugal rights, and the retention of the wife by a man in whose house she is living, constitute continuing wrongs, giving rise to constantly recurring causes of action on demand and refusal; *Hemchand v. Shiv*, P. J. 1883, p. 124; followed in *Bai Sari v. Sankla*, P. J. 1892, p. 18. See, however, the notes to Art. 35.

**Sect. 24.** *Suit for compensation for act not actionable without special damage.*—In the case of a suit for compensation for an act which does not give rise to a cause of action unless some specific injury actually results therefrom, the period of limitation shall be computed from the time when the injury results.

*Illustrations.*

- (a) A owns the surface of a field. B owns the subsoil. B digs coal thereout without causing any immediate apparent injury to the surface, but at last the surface subsides. The period of limitation in the case of a suit by A against B runs from the time of the subsidence.
- (b) A speaks and publishes of B slanderous words not actionable in themselves without special

damage caused thereby. C in consequence refuses to employ B as his clerk. The period of limitation in the case of a suit by B against A for compensation for the slander does not commence till the refusal.

*Notes.*

In Act IX of 1871, this section was as follows:—"In the case of a suit for compensation, for an act lawful in itself, which becomes unlawful in case it causes damage, the period of limitation shall be computed from the time when the damage accrues." The alterations introduced into the present section and Illus. (b) apply its provision to all acts whether lawful or unlawful which do not give rise to an action until some injury results to the plaintiff therefrom.

Illus. (b) must have been introduced without a clear recollection in the mind of the draftsman as to what the case-law in India on slander was. The High Court in Calcutta has ruled that although every kind of abusive language may not be actionable, yet, having regard to the definition of defamation in the Penal Code, language which is calculated to injure the reputation, or which, having regard to the respectability and position of the person abused, is calculated to outrage his feelings, lower the estimation in which he is held by persons of his own class, and so bring him into disrepute is actionable without proof of consequential damage; *Ibin Hossein v. Haidar I. L. R.* 12 *Calc.* 109; and the Court therein refers to five other cases going back as far as 1861 in which the same principle was laid down. In a note to the case of *Srikant v. Satcori*, 3 *C. L. R.* 181, therein referred to, will be found a list of all the decided cases on the point, among which is a Bombay case; *Kashiram v. Bapuji*, 7 *Bomb. H. O. Rep. A. C. J.* 17. The result is, that this illustration rather leads to the inference that the law of slander in India is the same as it is in England, while the cases cited shew that such is not the case. The same effect is produced by the wording of Art. 25. At the same time it must be remembered that this Act is only a Limitation Act, and is not intended to

define or create causes of action, and illustrations of the time when limitation begins to run would not otherwise affect the law, even though they should state it inaccurately; *Jivi v. Ramji*, *I. L. R. 3 Bomb.* at p. 209.

Under this section the specific injury is the cause of action, consequently each separate specific injury constitutes a fresh cause of action, and a separate period of limitation will run for each. Thus if the defendant excavates in his own land, and thereby causes a subsidence in the plaintiff's, the person injured ought to sue in one action for all the effects, both existing and prospective, of *that* subsidence. But if in consequence of the defendant not supporting the plaintiff's land another subsidence occurs some years afterwards in consequence of the same excavation, the plaintiff will be entitled to bring a second suit for this subsidence, and limitation will run from the date on which it occurred; *Mitchell v. Darley Main Colliery Co.*, 14 *Q. B. D.* 125; *S. C.* on appeal 11 *App. Ca.* 127; (overruling *Lamb v. Walker*, 3 *Q. B. D.* 389, but concurring in the judgment of *Cockburn*, C. J., therein); followed in *Crumbie v. Wallsend Local Board*, [1891] 1 *Q. B.* 508; a case of a continuous subsidence of the surface, causing an increasing amount of damage.

**Sect. 25.** *Computation of time mentioned in instruments.*—All instruments shall, for the purposes of this Act, be deemed to be made with reference to the Gregorian calendar.

*Illustrations.*

- (a) A Hindu makes a promissory note bearing a native date only, and payable four months after date. The period of limitation applicable to a suit on the note runs from the expiry of four months after date computed according to the Gregorian calendar.
- (b) A Hindu makes a bond bearing a native date only, for the repayment of money within one year. The period of limitation applicable to a suit on the bond runs from the expiry of one

year after date computed according to the  
Gregorian calendar.

*Notes.*

Act I of 1868 had already provided that in any Act of the Legislative Council of India passed after that Act, year and month should respectively mean a year and month reckoned according to the British calendar, and this section simply provides that for the purposes of this Act all instruments shall be deemed to bear that date according to the Gregorian calendar which corresponds to the native date which they actually bear.

The question as to what is a calendar month has been discussed in England, on a point as to the duration of a sentence in the case of *Migotti v. Colvill*, 4 C. P. D. 233, in which, at p. 238, Brett, L. J., says, "the meaning of the phrase is that, in computing time by calendar months, the time must be reckoned by looking at the calendar and not by counting days; and that one calendar month's imprisonment is to be calculated from the day of imprisonment to the day numerically corresponding to that day in the following month less one;" for instance from the 27th of one month to the 26th of the next, the day of sentence being counted as the first day of the month: under this Act, the day from which limitation is reckoned is excluded, so that the first day of the month would be the next day, in the case put, the 28th, and the month would expire on the 27th of the next month; see Sect. 12. In the same case *Cotton*, L. J., said, "If there are not enough days in the second month to satisfy this rule the calculation is made in the favour of the prisoner, and he will be liberated on the first day of the month." So, too, in the case of bills of exchange, all drawn at one month on the 29th, 30th, or 31st January will fall due (excluding the days of grace) on the 28th of February, or in leap-year on the 29th; see the judgment of *Denman*, J., in the above case; *ib.* 236. In the case of calendar years no difficulty would arise except in the case of a period counting from the 29th February in a leap-year, because the end of the period would fall in the corresponding month of the next year, when, of course, the number of days would be the same as in

the initial month. Where a bond, by its terms stated that money advanced should be repaid on the 30th Pous, 1283, B. S., and it so happened that Pous in 1283, had only twenty-nine days, the 29th Pous answering to the 12th January 1877, it was held that a suit brought on the 13th January 1880 was in time; *Almas Bane v. Mahomed*, I. L. R. 6 Cal. 239; the Court holding that the parties intended that the money should not be payable until the thirtieth day after the commencement of the first moment of the month of Pous; followed in *Gnanasammanda v. Palaniyanda*, I. L. R. 17 Mad. 61. Where a bond, dated the 29th December 1881, was payable in two years, it was held that the cause of action arose on the 29th December 1883, and not on the 28th; *Venkerbai v. Lakshuman*, I. L. R. 12 Bomb. 617.

This section is absolute, and there is no saving of cases in which it appears on the face of the contract that the parties intended to calculate by lunar months. Thus where a document provided:—“in the month of Kartik, *i. e.*, in four months,” it was held that the four months must be reckoned as four calendar months from the date of the instrument, although that would extend the time beyond Kartik; *Rungo v. Babaji*, I. L. R. 6 Bomb. 83.

Where a bond bears a native date only and is made payable after a certain time whether denoted by the month or year, it is to be computed according to the Gregorian calendar; *Nilkanth v. Dattatraya*, I. L. R. 4 Bomb. 103.

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## PART IV.

## ACQUISITION OF OWNERSHIP BY POSSESSION.

**Sect. 26.** Acquisition of right to easements.—*Where the access and use of light or air to and for any building have been peaceably enjoyed therewith, as an easement, and as of right, without interruption, and for twenty years.*

*and where any way, or water-course, or the use of any water, or any other easement (whether affirmative or negative) has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, and for twenty years.*

*the right to such access and use of light or air; way, water-course, use of water, or other easement, shall be absolute and indefeasible.*

*Each of the said periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit wherein the claim to which such period relates is contested.*

**Explanation.**—*Nothing is an interruption within the meaning of this section, unless where there is an actual discontinuance of the possession or enjoyment by reason of an obstruction by the act of some person other than the claimant, and unless such obstruction is submitted to or acquiesced in for one year after the claimant has notice thereof and of the person making or authorizing the same to be made.*

*Illustrations.*

- (a) *A suit is brought in 1881 for obstructing a right of way. The defendant admits the obstruction but denies the right of way. The plaintiff proves that the right was peaceably and openly enjoyed by him, claiming title thereto as an easement and as of right, without interruption, from 1st January 1860 to 1st January 1880. The plaintiff is entitled to judgment.*



- (b) *In a like suit also brought in 1881 the plaintiff merely proves that he enjoyed the right in manner aforesaid from 1858 to 1878. The suit shall be dismissed, as no exercise of the right by actual user has been proved to have taken place within two years next before the institution of the suit.*
- (c) *In a like suit the plaintiff shews that the right was peaceably and openly enjoyed by him for twenty years. The defendant proves that the plaintiff on one occasion during the twenty years had asked his leave to enjoy the right. The suit shall be dismissed.*

### Notes.

This section is the same as Sect. 27 of Act IX of 1871. These two sections simply provide, that if their provisions are complied with the right to an easement shall be absolute and indefeasible. Their object is to make more easy the establishment of rights by possession and enjoyment. A man may acquire a title thereunder who has no other title at all, but they do not provide that a right to an easement can be acquired in no other way than those therein provided, and therefore do not exclude or interfere with other titles and modes of acquiring easements; *Modhoosoodun v. Bissonauth*, 15 Ben. L. R. at p. 366; *Rajrup Koer v. Abul Hossein*, 7 I. A. 240; I. L. R. 6 Calc. 394, at p. 402; followed in *Achul v. Rajun*, ib. 812; *Punja Kuvarji v. Bai Kuvar*, I. L. R. 6 Bomb. 21; and *Charu Surnokar v. Dokouri Chunder*, I. L. R. 8 Calc. 956. This is not the place to discuss what were or are the requisites for establishing the right to an easement otherwise than under this Act, but besides the foregoing cases the following may be referred to on this point; *Joyprokash v. Ameer Ali*, 9 W. R. 91; *Askar v. Rammanick*, 13 W. R. 344; *Aukhoy v. Mollah*, ib. 449; *Mahomed v. Joogul*, 14 W. R. 124; *Futteh Ali v. Asgar Ali*, 17 W. R. 11; *Bagram v. Ketternath*, 3 Ben. L. R. O. C. 18; *Elliott v. Bhoobun*, 12 Ben. L. R. 406 and 19 W. R. 194 (P. C.); and further as to the necessary duration of enjoyment; *Raja Bijoy v. Obboy*, 16 W. R. 198; *Kurupam v. Meranji*, I. L. R. 5 Mud. 253; *Khetternath v. Prossunno*, 7

*W. R.* 493; *Juggut v. Juggut*, 12 *W. R.* 519; *Hurreedoss v. Jodoonath*, 5 *Ben. L. R. App.* 66; *Koylas v. Sonatun*, *I. L. R.* 7 *Calc.* 132. This chapter does not apply to claims which are, not merely claims to rights to or over land or water, or the right to levy fees for the use of a ferry, but a monopoly, a right to prevent other people exercising a right which they would ordinarily possess; *Nityahari v. Dunne*, *I. L. R.* 18 *Calc.* p. 662.

So far as regards Madras, the Central Provinces, and Coorg, this section and the following have been repealed by Act V of 1882, Sect. 3; and as far as regards Bombay, the North-West Provinces and Oudh, these sections have been repealed by the operation of Act VIII of 1891 which makes the Indian Easement Act applicable to these last named territories; and Sects. 15 and 16 of the last named Act have been enacted in their stead which, although rather more elaborated, are practically to the same effect as the two repealed sections of this Act. A third section is added to these two in Act V of 1882, viz., Sect. 17, which provides that certain rights cannot be acquired in the manner provided in the two preceding sections, and this last named section cuts down the definition of easement in this Act, and excludes several so-called easements which would come under the present section.

By this section the mode of acquiring a right to light, and a right to air are put upon the same footing; *Delhi & London Bank v. Hem Lall*, *I. L. R.* 14 *Calc.* 839.

*Person.*—By Act I of 1868, Sect. 2, the word person includes any company or association, or body of individuals, whether incorporated or not. Under this section, however, the same persons must be shewn to have exercised the rights claimed; an unincorporated fluctuating body of persons, like tenants of certain *pergunnahs*, do not come within this term; *Lutchmeput v. Sadanulla Nushyo*, *I. L. R.* 9 *Calc.* at p. 703. This decision may be right in this particular case, but why should not the tenants of certain *pergunnahs* have as much right to prescribe for a certain easement as copyholders of a manor would have to prescribe for the right of common, the latter *may* be as fluctuat-

ing a body as the tenants in the former case; and the High Court at Bombay has held that the right of free pasturage may be acquired by a village in the Bombay Presidency by custom or prescription; *Secretary of State v. Mathurabai*, *I. L. R.* 14 *Bomb.* 213. *Kay*, J., has ruled that a right in the nature of a profit *à prendre* could not be claimed by prescription on behalf of a large and indefinite class such as "owners and occupiers"; *Tilbury v. Silva*, 45 *Ch. D.* 98.

*Enjoyment.*—There is a difference in the description of the enjoyment of light and air, and of other easements. Light and air must have been enjoyed peaceably, other easements peaceably and *openly*. The probable reason of the difference is that every one can see what light and air his neighbour is enjoying by looking at the outside of his neighbour's house, but other easements, such as right of way, may be used clandestinely. Enjoyment does not mean actual user; the use of light has been actually enjoyed with a building if the owner has had the amenity or advantage of using the access of light whenever he chooses to use it, although there may not have been an actual continuous user, as in the case of a window with shutters capable of being opened, but which were often kept closed; *Cooper v. Straker*, 40 *Ch. D.* 21. In the case of a discontinuous easement, the claimant must be considered as enjoying it all the year round so long as there is no interruption whenever he has occasion to make use of it; *Koylash Chunder v. Sonatun Chung*, *I. L. R.* 7 *Calc.* 132. Thus there may be a right to pass and repass along a certain channel over the defendant's land during the monsoon only; *Ramssoonder v. Woomakant*, 1 *W. R.* 215. Where such a right had been exercised every rains up to 1875, and the passage was obstructed on the 1st June 1876, before the rains of that year, and the suit was brought on the 6th April 1878 it was held that it was not barred, as the enjoyment had continued up to the 1st June 1876, and that illus. (b), so far as it attempts to define enjoyment as actual user, must be rejected; especially as the latter clause which follows the words "the suit shall be dismissed" are unnecessary for the purposes of the illustration; *Koylash Chunder v. Sonatun Chung*, *ubi sup.* This interpretation is in accordance with English

law, under which it has been held that the cessation of the use of a water-course through the accident of a dry season which the claimant could not control is not an interruption of user; *Hall v. Swift*, 4 Bing. N. C. 381; nor is the cessation of the easement of grazing cattle owing to the claimant having no cattle to graze; *Carr v. Foster*, 3 Q. B. 581; *Sham Churn v. Tariney Churn*, I. L. R. 1 Calc. 422, at p. 430. Light and air must be enjoyed by a definite and the same access; *Harris v. DePinna*, 33 Ch. D. at p. 25c.

*Peaceably.*—Repeated obstructions or interruptions by or on behalf of the servient owner shew that the enjoyment has not been peaceable; *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267.

*Openly.*—The enjoyment of any easement must be open, not clandestine. It must be such that the servient owner, but for his laches, must have known what the enjoyment was, and how far it went; *Dalton v. Angus*, 6 App. Ca. at p. 828, *et aliunde*. If the enjoyment be not open, it may not amount to enjoyment *as of right*. It is not necessary, however, that the enjoyment of the easement should be actually known to the servient owner, provided it be not clandestine; *Arzan v. Rakhal Chunder*, I. L. R. 10 Calc. 214; followed in *Ganpatrav v. Baji*, P. J. 1889, p. 196.

Where the claimant himself has created some obstruction of a permanent character on his own property which renders the enjoyment of the easement impossible so long as the obstruction continues, he cannot be said to have openly enjoyed it; *e. g.*, blocking up a door in his house which led to a path across his neighbour's land; *Sham Churn v. Tariney Churn*, I. L. R. 1 Calc. at p. 430.

*As an easement.*—The word easement, under this Act, has a much more extensive meaning than under English law, for it includes any right, not arising from contract, by which one person is entitled to remove, and appropriate for his own profit, any part of the soil belonging to another, or anything growing or attached to, or subsisting upon, the land of another. It, therefore, embraces what in English law is known as a *profit à prendre*. It extends to a right to take fish out of a neighbour's pond, for land

is not merely dry land, but includes land covered with water; *Chunder Churn v. Shib Chunder*, *I. L. R.* 5 *Calc.* 947. This was not so under Act IX of 1871; *Parbutty Nath v. Mudho Parve*, *I. L. R.* 3 *Calc.* 276; because that Act did not contain a clause interpreting the word easement, and so easement therein kept its more restricted meaning.

The user of a water-course by virtue of a claim to the ownership of the land over which it runs, will not support a claim to the user of it as an easement; *Chunilal v. Manguldas*, *I. L. R.* 16 *Bomb.* 592.

The acts relied upon as evidence of the existence of a right must be done by one person upon the land of another. The acts must not be done by him upon his own land or land in his possession. While unity of possession lasts, no question of easement can arise, as the person in possession is entitled to the soil itself; *Anderson v. Juggodumba*, 6 *O. L. R.* 282, 284. Unity of possession at any time within the twenty years is fatal to a claim under this section; *Modhosoodun v. Bissonath*, 15 *Ben. L. R.* 361.

*As of right.*—These words do not mean “without trespass,” but in the assertion of a right; *Alimooddeen v. Vazeer Ali*, 23 *W. R.* 52. Any enjoyment which has been adverse to the owner of the servient tenement as the exercise of a right, and not at the mere will and favour of the owner is enjoyment as of right; *Askar v. Rammanich*, 13 *W. R.* 344; *Aukhoy v. Mollo Nobbes*, *ib.* 449; *Futteh Ali v. Asgur Ali*, 17 *W. R.* 11. Enjoyment of apertures admitting light and air is of right when it is open and manifest and not furtive and invisible; *Mathuradas v. Bai Amthi*, *I. L. R.* 7 *Bomb.* 522.

*Interruption.*—Interruption means an obstruction or prevention of the user of the easement by some person acting adversely to the person who claims it; *Sham Churn v. Tariney Churn*, *I. L. R.* 1 *Calc.* at p. 429. The mere existence of the physical obstruction is not sufficient, there must be some notice to the person interrupted of the person by whose authority the interruption is made; *Seddon v. Bank of Bolton*, 19 *Ch. D.* 462. To negative acquiescence in an interruption, if the obstruction cannot be

summarily removed, it is sufficient if the claimant communicate in some reasonable manner his refusal to acquiesce; *Glover v. Coleman*, L. R. 10 C. P. 108. The mere *cessation* of user does not amount to an interruption if it be accidental and not intentional, as of a water-course in a dry season; *Hall v. Swift*, 4 Bing. N. C. 381; or of the easement of grazing cattle during a time when the claimant has none to put out to graze; *Carr v. Foster*, 3 Q. B. 581; *Durga v. Bhonatu*, Panj. Rec. No. 106 of 1883; or of an easement which can only be used in the rains; *Koylash Chunder v. Sonatum Chung*, I. L. R. 7 Calc. 182.

*Twenty years*.—Evidence of user a little before and a little after the commencement of the time is ground for presuming user at the commencement of the time when prescription would begin to run; *Lawson v. Langley*, 4 A. and E. 890.

*Two years*.—If there has been obstruction for more than two years before the suit is brought, the right cannot be maintained; *Luchmi Persad v. Tilukdaree*, 24 W. R. 295.

*The Crown*.—It has been held in England that the Courts may independently of the Statute presume a grant from the Crown from an uninterrupted enjoyment of twenty years; *Goodtitle v. Baldwin*, 11 East, 488; and the same has been held to be the case in India; *Punnusawmi v. Collector of Madura*, 5 Mad. H. C. Rep. 6; *Collector of Thana v. Dadabhai*, I. L. R. 1 Bomb. p. 361. The High Court in Calcutta has also intimated that under this Act, too, a title might be acquired as against the Crown by twenty years' user; *Arzan v. Bakhal Chunder*, I. L. R. 10 Calc. 219. Where, however, Act V of 1882 is in force this rule will not apply, as the last paragraph of Sect. 15 of that Act provides that, where the servient tenement belongs to Government, there must be sixty years' enjoyment before any right to an easement can be acquired; and in Bombay it has been held that, although the Government may be bound by this Act as a *limitation Act*, it is not bound by this section which does not relate to limitation, but to a branch of substantive law, and to the creation of rights by the enjoyment of them; *The Secretary of State v. Mathurabai*, I. L. R. 14 Bomb. 213.

**Sect. 27.** Exclusion in favour of reversioner of servient tenement.—*Provided that, when any land or water upon, over, or from which any easement has been enjoyed or derived has been held under or by virtue of any interest for life or any term of years exceeding three years from the granting thereof, the time of the enjoyment of such easement during the continuance of such interest or term shall be excluded in the computation of the said last mentioned period of twenty years, in case the claim is, within three years next after the determination of such interest or term, resisted by the person entitled, on such determination, to the said land or water,*

*Illustration.*

*A sues for a declaration that he is entitled to a right of way over B's land. A proves that he has enjoyed the right for twenty-five years; but B shews that during ten of these years C, a Hindu widow, had a life interest in the land, that on C's death B became entitled to the land, and that within two years after C's death he contested A's claim to the right. The suit must be dismissed, as A, with reference to the provisions of this section, has only proved enjoyment for fifteen years.*

**Notes.**

This section differs from Sect. 28 of Act IX of 1871 in that that section excluded from its operation “the access and use of light and air.”

This section is entirely for the benefit of the remainderman or reversioner. According to the English cases the claimant must not only shew that he has enjoyed for twenty years exclusive of the term, but he must also shew that he has enjoyed *uninterruptedly* for twenty years before the commencement of the suit, and the law has thus been laid down in *Clayton v. Corby*, 2 Q. B. at p. 824:—If a tenancy for life be set up by the plaintiff during the time for enjoyment before suit, then the duration of that tenancy must be excluded and the defendant must prove the period of his enjoyment both before and after the tenancy so as to

make up the required period. If there is an interruption by the tenant for life of the requisite length within the prescribed time for bringing the action, the plaintiff will not be deprived of the benefit of the interruption. The tenant for life cannot burden the estate, but he may by resistance free it. The plaintiff may shew the interruption and then the defendant will not be allowed to shew the tenancy for life in evidence in order to avoid the effect of the interruption; see also *Pye v. Mumford*, 11 Q. B. at p. 676. Where the plaintiff's right of succession to an hereditary office accrued in 1847, when A took it under a will, and it was then held that his possession was adverse to the plaintiff, it was held that the plaintiff was precluded, under the provisions of the corresponding section of the Act of 1871, from setting up a fresh right on the death of A, as the only male member of the founder's family; *Manally v. Mungadi*, I. L. R. 1 Mad. 343.

The words in this section are devoid of technicality, consequently it is sufficient to prove that there has been some interest for life, or some interest for a term of years, and that the person resisting the claim is a person entitled in some manner to the estate on the determination of the term. The Courts here will not have to distinguish between a reversioner and a remainderman as was the case in *Laird v. Briggs*, 19 Ch. D. 22; and *Symons v. Leaker*, 15 Q. B. 629.

**Sect. 28.** *Extinguishment of right to property.*—At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

*Notes.*

This section differs from Sect. 29 of Act IX of 1871 which applied only to land or an hereditary office. This section applies to *all property for the possession of which a suit can be instituted*, whether the property be moveable or immoveable; *Kanharam-kutti v. Uthotti*, I. L. R. 13 Mad. 491; but not to claims other than to property which can be recovered in specie, *e. g.* debts, whether ordinary or judgment debts; *Ganda Mal v. Nanak Chand*, Panj. Rec. No. 3 of 1887. In respect of debts the law of limitation in



India merely bars the remedy but does not extinguish the right ; *Nursing Dyal v. Hurryhur*, I. L. R. 5 Calc. 897; *Mohesh Lal v. Busunt Kumaree*, I. L. R. 6 Calc. 340, following *Valia Jamburati v. Vira Rayan*, I. L. R. 1 Mad. 228, and *Madhavan v. Achuda*, *ib.* 301; and overruling *Nocoor Chunder v. Kally Coomar*, I. L. R. 1 Calc. 328, *Krishna Mohun v. Okhilmoni*, I. L. R. 3 Calc. 333, and *Ramchander v. Juggulmonmohini*, I. L. R. 4 Calc. 283; consequently the existence of a time-barred money decree for the amount of a mortgage does not bar the right to recover possession of the mortgaged property; *Ganda Mal v. Nanak Chand*, *Panj. Rec.* No. 3 of 1887. It is to be remarked that in *Hargovandas v. Bajibhai*, I. L. R. 14 Bomb. 222, neither of the Judges seemed to observe that this section applies only to cases of possession of property, not to cases of other kinds of relief in respect thereof. It might be interesting to trace what was the effect, under Acts and Regulations earlier than Act IX of 1871, of the determination of the period limited to bring a suit, but it would be useless for the time to come, except in very rare instances, as the present section provides for all cases of possession of property; and Sect. 2 provides for all cases of every kind which have become barred under any former Act or Regulation.

This section only applies to persons out of possession who have lost their right to regain the possession which they have lost. To persons who are in possession, and have no occasion to sue for it, the section can have no application, and does not prevent them making use of any legal defence open to them in order to maintain their possession; *Orr v. Sundra Pandia*, I. L. R. 17 Mad. 255.

This section was acted on in *Chenna Kisavabaya v. Vaidelinga*, I. L. R. 1 Mad. 348; and *Jagandri v. Ganeshi*, I. L. R. 3 All. 435.

Where a plaintiff has been in possession of lands rent-free for more than twelve years before suit, and sues to have it declared that he is entitled to hold the lands as *lakhiraj* lands, it is sufficient for him to prove that the defendant is barred by the law of limitation from taking resumption proceedings against him; *Abhoy Churn v. Kally Pershad*, I. L. R. 5 Calc. at p. 952; a suit for resumption or assessment being a suit for possession; *ib.*

Although a mortgagee may be barred under Art. 135, from suing for possession under his mortgage, that does not prevent his suing for foreclosure, and if the mortgage money be not paid, does not prevent him getting possession under a foreclosure decree. In the first case his right to possession is as mortgagee; after foreclosure he sues as owner. *Rallia Ram v. Sundar, Panj. Rec.* No. 83 of 1883.

Where the equity of redemption of an estate became, on the death of the mortgagor, the property of two divided branches of a Malabar *tarwad*, and the rents and profits of the land paid by the mortgagee were enjoyed exclusively by the representative of one branch for fifteen years, it was held that that branch had not thereby acquired an exclusive title to the mortgaged estate; *Chathu Nayar v. Aku, I. L. R., 7 Mad.* 26.

If a plaintiff in his plaint states facts with regard to his title which shew that the period within which he could bring his suit for possession has elapsed, he states in law that his title is extinguished, unless he can bring himself under some of the exceptions under which the law allows his title to continue; *Dawkins v. Lord Penrhyn, 4 App. Ca.* 58; referred to in *Permanand v. Sahib Ali, I. L. R., 11 All.* 438 (*F. B.*).

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## THE SECOND SCHEDULE.

## FIRST DIVISION: SUITS.

## Part I.—Thirty days.

**Art. 1.** *To contest an award of the Board of Revenue under Act No. XXIII of 1863 (to provide for the adjudication of claims to waste lands); thirty days from the time when notice of the award is delivered to the plaintiff.*

**Notes.**

This article is the same as Art. 1 of Act IX of 1871.

Under this section the Court has no power to extend the period of thirty days within which the suit has to be filed; *Taranath Dutt v. Collector of Sylhet*, 5 W. R. *Waste Land Reference*, 1. Under the present Act, too, the Court has no power to extend the time though there are circumstances under which the Act itself will extend it.

## Part II.—Ninety days.

**Art. 2.** *For compensation for doing, or for omitting to do, an act alleged to be in pursuance, of any enactment in force for the time being in British India; ninety days from the time when the act or omission takes place.*

**Notes.**

This article differs from that in Act IX of 1871 in that the words “compensation for” and “alleged to be,” have been added.

A person who claims the advantage of this article must shew that he had reasonable grounds for justifying his act under the particular enactment on which he relies; and not simply that he arbitrarily asserted, or thought so. He must, in short, have assumed to act in the honest exercise of a supposed statutory power; *Ganesh Dan v. Elliott*, *Panj. Rec.* No. 124 of 1881, and No. 160 of 1883; *Nurpat Rai v. Sirdar Kirpal*, *ib.* No. 65 of 1886. A plea of this article necessarily imports that the act relied upon

by the defendant was actually in force at the time and place where the acts complained of were done; it is not enough that the defendant honestly believed the act to be in force; *Jai Ram v. Gurmukh Singh*, *ib.* No. 105 of 1886. Where bricks were wrongfully seized and used by a Municipal Committee, but not in the exercise of any powers conferred upon them by the Municipal Act, a suit to recover the value thereof need not be brought within three months; *Harbhagwan v. Hussan*, *ib.* No. 79 of 1884; and the cases cited in the notes thereto.

There have been but few decisions on this article, but it has been held under similar provisions in other Acts that such words refer to some wrongful act or omission for which compensation can be made in damages, not for the recovery of land or the declaration of a right; *Foat v. Mayor of Margate*, 11 Q. B. D. 299; *Chunder Sikhur v. Abhoy Churn*, I. L. R. 6 Calc. 9; *Brij Mahun v. The Collector of Allahabad*, I. L. R. 4 All. 102; see also *Municipal Committee of Moradabad v. Chuttri Singh*, I. L. R. 1 All. 269; *Manni Kasaundhun v. Crook*, I. L. R. 2 All. 296; nor for the recovery of a sum of money due under a contract; *Mayandi v. McQuhae*, I. L. R. 2 Mad. 124; nor for an application for an injunction; *Flower v. Local Board of Leyton*, 5 Ch. D. 347; *Bateman v. Poplar District Board*, 33 Ch. D. 360; *President of Sivaganga v. Narayanan*, I. L. R. 16 Mad. 317; but it is not necessarily confined to actions for damages, strictly so called, but is applicable to every claim of a pecuniary character arising out of irregularities committed by public officers; *Ranchod Varajbhai v. Municipality of Dakor*, I. L. R. 8 Bomb. 421; *Selmes v. Judge*, L. R. 6 Q. B. 724; *Milland Railway Co. v. The Local Board of Withington*, 11 Q. B. D. 788; following the previous case; and *Waterhouse v. Keen*, 4 B. and C. 200; followed in *Ram Pitam v. Shoubul Chunder*, I. L. R. 15 Calc. 259. Where the time limited for bringing a suit was within six months after the accruing of the cause of action, and the defendants not having properly filled in an excavation, some damage accrued to the plaintiff more than six months before the filing of the suit, but the damage increased till within six months before the suit was filed, it was held that the suit was within time; *Crumbie v. Wallsend Local Board*,

[1891] 2 Q. B. 503. By the operation of Sect. 24 the same result would be brought about in this country.

It must be remembered that in nearly all the cases provided for by this section, notice is required, either by the Civil Procedure Code, or by some local or special Act, to be given to the defendant a certain time before the suit is filed, consequently it is not sufficient that the suit should be brought within 90 days, but the time required for the notice must also expire before that time expires. The cases cited are all cases deciding whether notice is required or not, but as in most cases the notice and the prescribed time for limitation are provided by the same section, they are applicable to the interpretation of this article.

A person acting in a certain position, although disqualified to hold that position, is entitled to notice before suit; *Lea v. Facey*, 19 Q. B. D. 352.

#### Part III.—Six months.

**Art. 3.** *Under the Specific Relief Act, 1877, Section 9, to recover possession of immovable property; six months from the time when the dispossession occurs.*

#### Notes.

This article in Act. IX of 1871 referred to Act XIV of 1859 which was the Act which then governed such suits.

What amounts to dispossession will be treated of under Art. 142; all other decisions must be sought for in notes to Sect. 9 of the Specific Relief Act. The mere discontinuance of payment of rent by tenants does not constitute a dispossession under the Specific Relief Act; the dispossession must be a forcible one of a person in physical possession; *Tarini v. Gunga*, I. L. R. 14 Calc. 649.

**Art. 4.** *Under Act No. IX of 1860 (to provide for the speedy determination of certain disputes between workmen engaged in railway and other public works and their employers), section one; six months from the date when the wages, hire, or price of work claimed accrue or accrues due.*

**Art. 5.** *Under the Code of Civil Procedure, Chapter XXXIX (of summary procedure on negotiable instruments); six months from the time when the instrument sued upon becomes due and payable.*

## Part IV.—One year.

**Art. 6.** *Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture; one year from the date when the penalty or forfeiture is incurred.*

**Art. 7.** *For the wages of a household servant, artisan, or labourer not provided for by this schedule, No. 4; one year from the date when the wages accrue due.*

## Notes.

In Act XIV of 1859, Sect. 1, Cl. 2, the words were “servants, artisans, or labourers”; Act IX of 1871 added the word “domestic” before servants, and the present Act has changed that word into “household.”

The word “servant” applies to all those between whom and some one else as employer there is a contract for service in consideration of wages, and this article applies to a suit brought by a servant against the person liable as the master in whose service he has been employed; *Siva Rama v. Turnbull*, 4 *Mad. H. C. Rep.* 43; *Abhaya Charan v. Haro Chandra*, 4 *Ben. L. R. App.* 68; 13 *W. R.* 150; and the word “servants” when coupled with “artisans and labourers” would indicate those who were employed in capacities similar to unskilled labourers; *Siva Rama v. Turnbull*, *ubi sub.*; whether in the public service or any other employment; *ib.*; but the addition of the word “domestic” and its subsequent change to “household” shews that it is doubtful whether the present article would apply to persons in the public service, but only to those who are engaged in household work. A person whose duties are to sweep and clean a temple, provide flowers for daily worship and garlands for the idol is not a household servant or labourer; *Muttirangotmunakal v. Erangot Trikovil*, 1 *L. R.* 7 *Mad.* 99. A teacher of fencing is not a servant, artisan, or labourer; *Pylwan Jarkan v. Jenaka Raja*, 8 *Mad. H. C. Rep.* 87; a tehsildar is not a servant; *Oroon Ohunder v. Ramanath Rukheet*, 10 *W. R.* 260; 1 *Ben. L. R. S. N.* 20; nor is a mooktear; *Nitto Gopal v. Mackintosh*, 6 *W. R. Civ. Ref.* 11; nor is a mohurir; *Abhaya Charan v. Haro Chandra*, *ubi sup.*; much less would they be household servants.

An "artisan" is one who exercises any mechanical employment; *Webster's Dict.* and an "artificer" has practically the same meaning. An artificer is a person who is to have the personal performance of some work for which he is to be paid wages, and this must be with reference to the original contract or obligation, the fact that he may work with the men employed under him does not of itself make him an artificer; *Sharman v. Sanders*, 22 L. J. N. S. C. P. 87. A workman or labourer is one who enters into a contract to employ his personal services, and to receive payment for that in wages; *Riley v. Ward*, 2 Exch. 59. A native artist who paints pictures for a customer, to be paid for at a price for each picture to be agreed upon on delivery and acceptance, is not an artisan; *Viraswami v. Sayambabay*, 2 Mad. H. C. Rep. 6. A person who is a contractor and sub-contractor and who engages to get work done but does not engage in work himself is not a workman, artificer, or labourer; *Gillvy v. Subbu Pillai*, I. L. R. 7 Mad. 100; *In re Balkrishna Shalijram*, I. L. R. 10 Bomb. 196. A man who agrees, in consideration of the use of land and a third of the produce for the season, to provide seed and labour and carry on the cultivation of the land is not a labourer; *Andi Konan v. Venkata Subbaiyan*, 2 Mad. H. C. Rep. 387; a suit by a goldsmith to recover the price of his labour in making ornaments falls under Art. 56, and not under this article; *Vishnu v. Gopal*, P. J. 1885, p. 252.

This article does not apply to a suit by one servant against a superior servant who has drawn the wages of the whole establishment and failed to pay over a portion thereof to the plaintiff; *Siva Rama v. Turnbull*, 4 Mad. H. C. Rep. 43; *Abhaya Charan v. Haro Chandra*, 4 Ben. L. R. App. 68.

A monthly salary is ordinarily due at the end of each month, and limitation begins to run at that time for the month's salary then due, not at the time the servant is dismissed; *Kalichurn v. Mahomed*, 6 W. R. Civ. Ref. 33.

**Art. 8.** For the price of food or drink sold by the keeper of a hotel, tavern, or lodging-house; one year from the time when the food or drink is delivered.

**Art. 9.** *For the price of lodging ; one year from the time when the price becomes payable.*

### Notes.

Under Act IX of 1871 the prescribed period ran from the time when the lodging ended, the present Act compels the landlord to sue for rent prior to the termination of the lodging within twelve months from the time each instalment becomes due, and thus shortens the time allowed by the former Act.

**Art. 10.** *To enforce a right of pre-emption whether the right is founded on law, or general usage, or on special contract ; one year from the time when the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.*

### Notes.

In Act IX of 1871 the time from which limitation ran is described as " when the purchaser takes actual possession under the sale sought to be impeached " assuming that the purchaser always could and did take actual possession.

Under Act IX of 1871 the High Court at Allahabad held that the purchaser of an equity of redemption got actual possession when the equity of redemption was completely transferred to and vested in him ; *Jageahwar v. Jawahir*, I. L. R. 1 All. 311 (F. B.) this was followed in *Bijai Ram v. Kallu*, *ib.* 592, where it was held that actual possession was obtained when mutation of names in respect of the property was completed, the purchaser not being able to obtain physical possession ; see, also, *Ganeshdas v. Toola*, *Agra F. B.*, 1874, p. 167 ; but in *Gulab v. Amuk*, I. L. R. 2 All. 237, it was held that actual possession was obtained when the deed of sale was executed and not when mutation of names was completed ; *Mahomed v. Gunga Ram*, 3 *Agra*, 260 ; *Ram Saru v. Hirde*, *Panji. Rec.* No. 63 of 1883 ; or from the time when the sale was otherwise actually completed, as by payment of the purchase-money after the execution of an agreement for sale ; *Lachmi v. Sheombar*, I. L. R. 2 All. 409.



These questions have been set at rest by the alteration in the present article, which provides that where physical possession can be obtained then that is the date whence the period of limitation runs, otherwise it runs from the date of the registration of the document of sale. The date of registration is the date when the deed is copied into the Registrar's book, and the certificate of registration is endorsed upon it; *Kurm v. Fazl*, *Panj. Rec.* No. 10 of 1881. *Possession* must mean *possession as purchaser*, not in some other capacity, as that of mortgagee, lessee, &c. Therefore it has been ruled that a mortgagee in possession buying the mortgaged property obtains physical possession within the meaning of this article when the sale to him is actually completed, as then his possession, which was before that of a mortgagee, becomes that of owner; *Lachmi v. Sheombar*, *I. L. R.* 2 *All.* 409; see, also, *Buksha v. Tofer*, 20 *W. R.* 216; *Buldrée v. Doorga*, 2 *N. W.* 284. *Physical possession* does not merely mean that the possessor occupies the property personally and resides on or cultivates it. A man is in physical possession if the tenants have attorned to him and pay him their rents, just as much as if he had turned them all out and then relet the land to them or others. Where the whole property is not capable of being physically possessed, then limitation runs from the date of registration; *Umar Buksh v. Chogutta*, *Panj. Rec.* No. 156 of 1882.

A mortgagee under a conditional sale cannot, where the Bengal Regulations are in force, take possession as proprietor immediately the condition is broken, but must give the legal notices, and obtain a decree of a competent Court putting him in possession, or acknowledging his right to remain in possession, as proprietor; *Forbes v. Amceroonissa*, 10 *Moore I. A.* 340; consequently he only takes physical possession when he is put, or suffered to remain, in possession by the Court, and limitation runs from that time; *Alu Prasad v. Sukhan*, *I. L. R.* 3 *All.* 610 (*F. B.*); *Prag Chaubey v. Bhajan Chaudhry*, *I. L. R.* 4 *All.* 291; and to the same effect *Jaikaran Rai v. Ganga Dhuri*, *I. L. R.* 3 *All.* 175; *Rasik Lal v. Gujraj Singh*, *I. L. R.* 4 *All.* 414; *Ashik Ali v. Mathurakandu*, *I. L. R.* 5 *All.* 187; *secus* *Lachman Prasad v.*

*Bahadur Singh*, *I. L. R.* 2 *All.* 284; but this was overruled in the *F. B.* case reported in *I. L. R.* 3 *All.* 610.

In the Full Bench case of *Ali Abba v. Kalka Prasad*, *I. L. R.* 14 *All.* 405, it was held that where property has been mortgaged by a conditional sale the right of pre-emption arises on the expiration of the year of grace; overruling *Prag Chaubey v. Bhajan*, *Rusik Lal v. Gujraj Singh*, *ubi. supra*, and *Udit v. Padarath*, *I. L. R.* 8 *All.* 54; but no notice seems to have been taken of the previous *F. B.* decision in *Alu Prasad v. Sukhun*, *ubi supra*.

The same principle as was laid down in the earlier Full Bench case in Allahabad has been acted on in Calcutta, in *Goshain Gobind v. Fatima*, 2 *W. R.* 5; *Goordyal v. Teknarain*, *ib.* 215; and *Buksha v. Tofer*, 20 *W. R.* 216; from which we learn the law to be that the sale must be complete, the vendor have parted with possession and the purchaser taken possession as purchaser; and that while any right of redemption remains in the mortgagor, no right of pre-emption arises. See, also, *Digambur v. Ram Lall*, *I. L. R.* 14 *Calc.* at p. 767.

In the case of *Goshain Gobind v. Fa'ima*, 2 *W. R.* 5, the one year's limitation from the time of the purchaser obtaining possession as above was applied to the case of a conditional sale, and there appears to be no case in Calcutta under either of the Acts of 1871 and 1877 in any way modifying that ruling. In *Jaikaran Lal v. Ganga Dhari*, *I. L. R.* 3 *All.* 175, a division Court, consisting of *Stuart*, C. J., and *Oldfield*, J., held that this article applied to the case of a conditional sale, and in *Alu Prasad v. Sukhan*, *ib.* 610, a Full Bench decision in which the same two Judges took part, although this question was not actually being discussed, it may be inferred that no doubt arose in the mind of the Court as to this article being applicable, because it was pointed out at p. 630, that in the case of a claim of pre-mortgage, this article would scarcely be applicable. The prior case in the same volume was, however, not referred to, although it was in point on the question under discussion. Subsequently, in *Nath Prasad v. Ram Paltan*, *I. L. R.* 4 *All.* 218, a Full Bench held that the sale referred to in this article must be an absolute one, having immediate effect and operation, in those cases where the interest passed is capable of

physical possession, by physical possession, and where it is not, by the creation of a title under an instrument duly registered; and held that this article did not apply to a conditional sale, at all, but Art. 120. In this case no reference was made to that of *Jaikaran Lal v. Ganga Dhari*, *ubi sup.* This has been followed in *Rasik Lal v. Gujraj Singh*, *I. L. R. 4 All. 414*; and *Ashik Ali v. Mathurakandu*, *I. L. R. 5 All. 187*. This seems to have been so ruled under an entire misapprehension of the meaning of this article. Under a conditional sale, the purchaser must get physical possession by and under the decree of a Court; consequently the first portion of the condition in the third column must apply, *viz.*, that limitation runs from the time the purchaser is put in physical possession, *i. e.*, by the Court, and so it has been ruled. But the article does not say that it is only applicable to cases in which the possession is to immediately follow the making of the contract, it only says that limitation in such cases does not run till the purchaser has taken physical possession as such. Besides the contract of sale does not come into operation until the condition is broken, and then, when that contract becomes operative, the interest passed is capable of being physically possessed, and physical possession is given by the Court. Further the article specially provides that, if physical possession cannot be taken, limitation runs from the date of the deed being registered. Thus there seems to be no reason why this article should not apply to conditional as well as to other sales.

A share in an undivided *zamindari mahal* is not susceptible of physical possession, consequently limitation will run from the date of the registration of the instrument of sale; *Unkar Das v. Narain*, *I. L. R. 4 All. 24*; *Bholi v. Imam Ali*, *ib.* 179; *Bishan Singh v. Sarudu*, *Panj. Rec. No. 48 of 1884*; *Sohan v. Hinnat*, *ib.* No. 61 of 1885. There can be no physical possession of an equity of redemption, limitation, therefore, in the case of a sale of such an interest runs from the date of the registration of the conveyance; *Shiam Sundar v. Amamant*, *I. L. R. 9 All. 234*; *Bhawani v. Attar*, *Panj. Rec. No. 68 of 1884*; *Gaffarkhan v. Satar*, *ib.* No. 160 of 1889.

If the *wajib-ul-arz* so provided, a man might have a right of pre-mortgage, but that would not prevent the right of pre-emption arising when the conditional sale became absolute; *Alu Prasad v. Sukhan*, I. L. R. 3 All. 610; *Ashuk Ali v. Mathurakandu*, I. L. R. 5 All. 187. So, too, where the *wajib-ul-arz* of a village gave a right of pre-emption on a transfer by sale or mortgage, a simple mortgage, as defined by Sect. 58 of the Transfer of Property Act, 1882, would create a right of pre-emption; *Sheoratan v. Mahipal*, I. L. R. 7 All. 258; but the prescribed period for limitation under a claim of pre-mortgage would not fall under this article; *Alu Prasad v. Sukhan*, *ubi sup.* at p. 630; but under Art. 120; *Ashuk Ali v. Mathurakandu*, *ubi sup.*; *Uttam Singh v. Futteh Singh*, *Panj. Rec.* No. 103 of 1885.

The limitation for a suit for pre-emption of an undivided share in a joint holding which does not admit of physical possession, and to which the purchaser acquires his title by foreclosure proceedings and a suit for possession, does not fall under this article, but under Art. 120; *Ali Ganhar v. Jawahir*, *Panj. Rec.* No. 30 of 1892.

Where one man claiming the right of pre-emption asserts that he has a better right than another, the period of limitation as between these two is that provided by Art. 120, viz., 6 years; *Durga v. Haidur Ali*, I. L. R. 7 All. 167; *Untsada v. Hamira*, *Rec.* No. 11 of 1893; but it is exceedingly difficult to understand how this would work.

Where there is a contract between the vendor and vendee the pre-emptor is entitled to contend that his full right to impeach the sale does not accrue until the validity of the sale as between vendor and vendee has been established by a Court, for *non constat*, but that it might be found invalid, in which case the pre-emptor's cause of action would have disappeared; *Udit v. Padarath*, I. L. R. 8 All. 54. This decision is under Art. 120, it being a case of a conditional sale and the fact of such sales being held to come under that article accounts for the necessity of such a decision.

Where the right to pre-emption arose under a submission and award, those were held to constitute a special contract under this article; *Dafi v. Waman*, P. J. 1889, p. 334.

**Art. 11.** *By a person against whom an order is passed under Sections 280, 281, 282, or 335 of the Code of Civil Procedure, to establish his right to, or to the present possession of, the property comprised in the order; one year from the date of the order.*

### Notes.

This article does not occur in Act IX of 1871. Up to the passing of that Act, the provision was found at the end of Sects. 246 and 269 of Act VIII of 1859. Act IX of 1871 repealed the last twelve words of Sect. 246 providing for the limitation of one year, but it did not repeal the same words in Sect. 269, and the second schedule did not contain any article applicable to Sect. 246 *eo nomine*. The result was a divergence in opinion between the High Courts as to whether suits brought to recover property affected by orders under Sect. 246 were or were not suits to alter or set aside a decision or order of a Civil Court, provided for by Art. 15 of the Act of 1871. The High Court at Calcutta held and still holds that such suits, when brought during the continuance of Act IX of 1871, are not suits to set aside an order, and consequently they do not come under the provisions of Art. 15 of that Act, but could be brought within 12 years of the accrual of the cause of action. The High Court at Bombay held that such a suit must be brought within one year from the making of the order. As far as applications made under the sections mentioned in this article since Act X of 1877 came into force are concerned, that divergence no longer is of any moment, because this article is not limited to suits to set aside the order made under those sections, but applies to all suits to establish the *right* of the plaintiff *to the property* comprised in the order, or to its *present possession*, whether the suit be to set aside the order of a Court, or, giving the order the go-by, it be to get a declaration of the plaintiff's right. It has, however, been held in respect of suits brought since this Act has come into operation that the provisions of this article only apply to cases in which orders have been made under the

sections of Act X of 1877 enumerated therein, and not to orders made under Sect. 246 of Act VIII of 1859, and that in respect of suits for land affected by such orders the limitation is 12 years; *Luchmi Narain v. Asruf Koer*, I. L. R. 9 Calc. 43; *Gopal v. Mohesh*, ib. 230; *Gend Lall v. Denonath Ram*, I. L. R. 11 Calc. 678. In the case of *Bissessur Bhugut v. Murli Sahu*, I. L. R. 9 Calc. 163, Art. 120 was held to apply, although the inference to be drawn from the facts of the case is that the property was immoveable, but it is nowhere stated what the property was. The High Court at Madras has, however, ruled that an order under Sect. 269 of the Civ. P. C., 1859, made on 10th August 1877, was not deprived of the character which it possessed when passed, viz., being absolute unless a suit was brought to set it aside within one year, by the fact that that section was repealed on the 1st October 1877; *Venkatachala v. Appathorai*, I. L. R. 8 Mad. 134; see, also, *Bai Jamna v. Bai Ichha*, I. L. R. 10 Bomb. 604. The same Court has also held that this article applies to no other sections of the present Civil Procedure Code than those mentioned therein, and consequently a suit relating to property, in respect of which an order has been made under Sect. 332 of the Code, does not fall under its provisions; *Ayyasami v. Samiya*, I. L. R. 8 Mad. 82; *Narasima v. Appala Charlu*, I. L. R. 12 Mad. 294. By the provisions, however, of Sect. 487, it would apply to suits for property attached *before* as well as after judgment; but see, however, the principle laid down in *Ramanada v. Minatchi*, I. L. R. 3 Mad. 236; and *In re Ram Sunbu*, 3 C. L. R. 440. The question to be decided in such suits will be the right of the parties at the time the attachment was levied, and not at the date when the suit was actually brought; *Harishankar v. Naran*, I. L. R. 18 Bomb. 260.

*An order must have been made*, and where a Court refuses to make an order, but simply sells property subject to the claim of the claimant, and he is dispossessed, this article will not apply; *Baboo Jodoonauth v. Radhomoni*, 7 W. R. 256 (F. B.); *Kamessur v. Kadir*, 20 W. R. 393; *Rash Behary v. Gopi Nath*, 11 C. L. R. 352; or where the Court simply releases the property without making any order; *Jugobundho v. Sachya*, 16 W. R. 22; or

enquiry, *Bhola Dutt v. Ahmed*, 3 *Agra*, 397; *Kamran v. Neit*, 6 *N. W.* 185; so, too, where an investigation is refused; *Venkatanaru v. Akkamma*, 3 *Mad. H. C. Rep.* 139; *Syed Muhomed v. Kanhya Lall*, 2 *W. R.* 263; *Sab Mickhan v. Sab Kundum*, 15 *Ben. L. R.* 228 (*P. C.*); *Venkapa Chenbasapa*, 1. *L. R.* 4 *Bomb.* 21; approved of in *Krishnaji Vithal v. Bhaskar*, *ib.* 611; *Rash Behari v. Buddun Chunder*, 12 *C. L. R.* 550; *Chandra Busan v. Ram Kanth*, 1. *L. R.* 12 *Calc.* 108; or where claimant has made an application which he has withdrawn, and so no investigation has been held; *Bhikha v. Sakarlal*, 1. *L. R.* 5 *Bomb.* 441; or where the plaintiff has never made any claim at the time of attachment or sale; *Baboo Partaub v. Brojo Lall*, 7 *W. R.* 253 (*F. B.*); followed in *Lalchund Ambaidas v. Sakharam*, 5 *Bomb. H. C. Rep. A. C. J.* 139; *Deen Dyal v. Poran*, 9 *W. R.* 474; *Bheem v. Khoobun*, 17 *W. R.* 429.

But if an application is made to a Court and the Court thereupon makes an order, the person against whom the order is made is precluded from any other remedy than a suit within one year from the date of the order to establish his right; *Baboo Partaub v. Brojo Lall*, 7 *W. R.* 253 (*F. B.*); *Shebo Narain v. Muddun Ally*, 1. *L. R.* 7 *Calc.* 608, at p. 612; *Krishnaji v. Vithal Ravji*, 1. *L. R.* 12 *Bomb.* at p. 633; *Khub Lal v. Ram Iachurn*, 1. *L. R.* 17 *Calc.* 260; following *Sardhari Lal v. Ambika*, 1. *L. R.* 15 *Calc.* 521, and 15 *I. A.* 123; if the order be made after attachment of the property, he cannot wait till within one year after the sale thereof; *Settiappan v. Sarat Singh*, 3 *Mad. H. C. Rep.* 220; approved of in *Krishnaji Vithal v. Bhaskar*, 1. *L. R.* 4 *Bomb.* 611.

Where an applicant applied to have property released from attachment to the extent of Rs. 164, and the Court allowed the application to the extent of Rs. 64 only, that was virtually an order against the applicant to the extent of Rs. 100, and his right to the larger sum ought to have been established by a suit brought within one year from the date of the order; *Yeshvant v. Vithoba*, 1. *L. R.* 12 *Bomb.* 231.

The refusal of a Court to postpone a sale in order to enable the plaintiff to prove his claim is not an order against him referred to in this article; *Mukhun v. Koondun*, 2 *I. A.* 210.

A person whose interest has not been sold, but has been included in the certificate of sale, may apply under Sect. 335, Civ. P. C., and if an order is made against him, he must bring his suit within one year; and if he does not so bring his suit, the order will have the force of a decree against him; *Achuta v. Mamavu*, I. L. R. 10 Mad. 357; *Badri Prosad v. Muhammad*, I. L. R. 1 All. 382, followed in *Jeoni v. Bhagwan*, *ib.* 541; but he need not apply and if he does not, and subsequently brings a suit, this article will not apply; *Raboo Pertaub v. Brojo Lall*, 7 W. R. 253 (F. B.) decided under Sect. 269 of Act VIII of 1859; followed in *Lalchand v. Sakharan*, 5 Bomb. H. C. Rep. A. C. J. 139; *Deen Dyal v. Poran*, 9 W. R. 474; *Bheem v. Khoobun*, 17 W. R. 429.

The fact that an order has been made, after due notice to the claimant, in the absence of himself and his witnesses does not prevent the operation of this article; *Sreemant Hajrak v. Syud Tajooddeen*, 21 W. R. 409; *Tripoorra v. Ijjutoonissa*, 24 W. R. 411; *Sadut Ali v. Ram Dhone*, 12 C. L. R. 43; but see *Kallu Mal v. Brown*, I. L. R. 3 All. 504, which would almost seem to be an authority against these three cases.

Where the decree under which the order was made is on the face of it made without jurisdiction, this article will not apply; *Lalu Gandar v. Habibannissa*, 7 Ben. L. R. 235, and 15 W. R. 311.

The suits to which this article applies are those, the effect of which is to annul the operation of the order; suits which leave the order untouched, though they may dispossess the person in possession under the order, under rights untouched by it, need not be brought within one year, thus, the order under Sect. 335 determines the right to *present* possession, and any suit founded on facts which support or negative that right must be brought within the year; but a suit to establish any other right consistent with the order for present possession need not to be brought till the relief claimed becomes legally claimable; *Rango Vithal v. Rikhiyidas*, 11 Bomb. H. C. Rep. 174; *Bukshi Ram v. Sheo Pergash*, I. L. R. 12 Calc. 453; *Taponidi v. Mathura*, *ib.* 499; *Lopes v. Waman*, P. J. 1889, p. 17; *Bhau v. Bapuji*, *ib.* p. 101.



When an order is not signed on or as of the date on which it is verbally made, the date of signature is the date of the order; *Bapu Ishwar v. Lakshman Baji*, 10 *Bomb. H. C. Rep.* 19.

The fact that a claimant was unsuccessful in a claim he made against an attachment under one decree, which was subsequently paid off, does not prevent him making a similar claim against an attachment under another decree, and if unsuccessful in the second claim, he has one year from the date of its rejection to sue; *Umesh Chunder v. Raj Balubh*, *I. L. R.* 8 *Calc.* p. 282; *Kashinath v. Ramchandra*, *I. L. R.* 7 *Bomb.* 408; *Ibrahimhai v. Kabulabhai*, *I. L. R.* 13 *Bomb.* 72.

The plaintiff must have been a party against whom the order was made, in order to make this article applicable, *Kedar Nath v. Rakhal Das*, *I. L. R.* 15 *Calc.* 674; and this article applies to all persons who object to an order made against them, whether they be decree-holders, judgment-debtors, or persons claiming independently of either; *Sardhari Lal v. Ambika*, 15 *I. A.* 123, and *I. L. R.* 15 *Calc.* 521; the plaintiff consequently must have been a party to the investigation by the Court in order to be bound by the limitation of one year; for in the first place, the article only applies to suits by persons against whom an order has been made; secondly, not being a party to it, he is not bound by it, and therefore may treat it as non-existent, and sue upon the strength of his own legal rights; *Imbichi v. Kakkunnat*, *I. L. R.* 1 *Mad.* 391; *Mannu Lall v. Harsukh Das*, *I. L. R.* 3 *All.* 233.

A judgment-debtor is not necessarily a party against whom an order is made within the meaning of that term in Sect. 283, Civ. P. C., and if orders have been made in respect of property belonging to him which has been attached, to which he was not a party, this article will not apply to any suit he may bring for the purpose of establishing his right to the property which was the subject matter of such orders; *Kedar Nath v. Rakhal Das*, *I. L. R.* 15 *Calc.* 674; disagreeing with *Netietom v. Tayanbarry*, 4 *Mad. H. C. Rep.* 472, which in several subsequent cases had not been followed; and a judgment-debtor in an investigation is not represented by the judgment-creditor; *Shivapa v. Dod Nagaya*, *I. L. R.* 11 *Bomb.* 114.

The plaintiff bought property sold under an attachment. Subsequently to that attachment, another attachment was laid on the same property, which the judgment-debtor tried to raise, but failed, the plaintiff not being a party to the proceeding. The property was then sold under the second attachment, and bought by the defendant, who got possession as against the plaintiff whereupon the plaintiff filed a suit to assert his title; and it was held, that the fact that the judgment-debtor did not sue to set aside the order against him, did not affect the rights of the plaintiff; *Payapa v. Padmapa*, I. L. R. 11 Bomb. 45.

*Minor*.—The limitation of one year in Sect. 246 of Act VIII of 1859 is liable, in the case of a *minor*, to be modified by Sects. 11 and 12 of Act XIV of 1859; *Phoolbas v. Lalla Jogeshwur*, I. L. R. 1 Calc. 226 (P. C.); consequently the limitation provided in this article is subject to be modified by the operation of Sect. 7.

Owing to the view taken by the Calcutta Court as to the limitation applicable, under Act IX of 1871, to the cases provided for by this article, the judges there have held that the limitation herein provided being shorter than that under Act IX, Sect 2 of this Act applies to suits affected by this article; *Roy Chunder v. Modhoosoodun*, I. L. R. 8 Calc. 395.

Where, under the Dekkan Agriculturists' Act, it is necessary to get the certificate of a conciliator before bringing a suit to set aside an order declaring land not liable to attachment and raising the attachment, the time necessary to obtain such certificate must be added to the period prescribed by this article; *Durgaram v. Shripat*, I. L. R. 8 Bomb. 411.

**Art. 12.** *To set aside any of the following sales:—*

- (a) *sale in execution of a decree of a Civil Court; (b) sale in pursuance of a decree or order of a Collector or other officer of revenue; (c) sale for arrears of Government revenue, or for any demand recoverable as such arrears; (d) sale of a patni taluq sold for current arrears of rent; one year from the date when the sale is confirmed, or would otherwise have become final and conclusive had no such suit been brought.*

*Explanation.*—In this clause ‘patni’ includes any intermediate tenure saleable for current arrears of rent.

### Notes.

This is the same as Art. 14 of Act IX of 1871.

This article applies to suits in cases in which it is necessary that a sale should be set aside in order that the plaintiff may get the relief he seeks. It does not apply to cases in which the property was sold subject to the plaintiff's rights; *Rutnessur v. Majeda*, 7 W. R. 252; *Mungroo v. Jeydur*, 2 Agra, 231; *Bithul v. Lalla*, *ib.* 284; nor to a suit to recover property by setting aside a certificate of sale which included more property than had actually been sold, and under which the plaintiff had been dispossessed of a portion of the unsold property; *Baboo Pertaub v. Brojo Lall*, 7 W. R. 253 (F. B.); *Sharafatunnissa v. Lachmi*, 7 N. W. 288; nor to a suit for lands taken in excess of those included in a decree; *Gour Monee v. Shun Kuree*, 18 W. R. 459; nor to any suit respecting the proceeds of a sale, the validity of which is acknowledged, or which cannot be disputed; *Sivarama v. Subramanya*, I. L. R. 9 Mad. 57; nor where the right, title, and interest of a judgment-debtor are sold, to a suit by a third person claiming that the property or an interest therein belongs to him, and seeking possession or a declaration of title, because there is no need for him to set aside the sale, as the Court did not purport to sell his interest; *Nito Lalchund v. Sakharam*, 5 Bomb. H. C. Rep. A. C. J. 139; *Mahomed Buksh v. Mahomed Hossein*, 3 Agra, 171 S. C. Agra, F. B. 1874, p. 145; *Nito Kalee v. Kripanath Roy*, 7 W. R. 358; *Banee v. Radha*, 22 W. R. 196; *Tonoo Ram v. Mohessur Gossain*, 24 W. R. 302; *Shivrudrapa v. Shidlingapa*, P. J. 1877, p. 236; *Nathu v. Badri Das*, I. L. R. 5 All. 614; *Venkata Narasiah v. Sabamma*, I. L. R. 4 Mad. 178; *Suryama v. Durgi*, I. L. R. 7 Mad. 258; *Haji v. Atharaman*, *ib.* 512; *Nilakandan v. Thandamuna*, I. L. R. 9 Mad. 460; nor where the suit is to obtain a declaration that the sale is inoperative as against the plaintiff; *Parakh Ranchor v. Bai Vakhut*, I. L. R. 11 Bomb. 119. Where an order for a sale is *ultra vires*, it need

not be set aside; *Balwant Rao v. Muhammad Hussein*, *I. L. R.* 15 *All.* 324; nor need a sale which is *de facto* void; *Lala Sewa v. Kaushi, Panj. Rec.* No. 76 of 1890. See, also, *Raman v. Chandan*, *I. L. R.* 15 *Mad.* 219. A person who is a party to a decree in his representative character under which the right, title, and interest of the person he represents in certain property are sold, need not sue to set aside the sale when he claims the property in his personal capacity, or as the representative of another person; *Kali Mohun v. Anandamoni*, 9 *C. L. R.* 18. A party, who is a minor, is not bound by the decree unless he is properly represented in the suit by a guardian legally appointed, *e. g.*, in the *Mofussil* of Bombay, under Act XX of 1864; *Daji Himat v. Dhirajram* *I. L. R.* 12 *Bomb.* 18; or in Bengal under Act. XL of 1858; *Doorga Pershad v. Kesho Persad*, 9 *I. A.* 25; *Padmakar v. Mahadev*, *I. L. R.* 10 *Bomb.* 21; and need not sue to set aside a sale made in a suit to which he was not properly a party within one year from his majority; *Vishnu v. Ramchandra*, *I. L. R.* 11 *Bomb.* 132. This, however, does not ordinarily apply to a case of a joint Hindu family properly represented by a manager, suing or being sued as manager; see the remarks in the judgment in the last mentioned case, and in *Gan Savant v. Narayan*, *I. L. R.* 7 *Bomb.* 467, and the cases cited therein.

There is nothing, however, in the article which restrains its operation to parties to the proceedings which took place; and it applies to all cases in which the *property itself* has been sold, and the sale purports to pass the property absolutely, and would do so, if the sale were not set aside; *Suryama v. Durgi*, *I. L. R.* 7 *Mad.* 258 (in which the operation of the judgment in *Sriman Sadagopa v. Jamuna*, *I. L. R.* 5 *Mad.* 54, is somewhat limited). A sale of *tarwad* property under a decree against the *karnavan* passes the whole property, and therefore it requires to be set aside; *Haji v. Atharaman*, *I. L. R.* 7 *Mad.* 512.

Where property is sold under a valid and subsisting decree, which is afterwards reversed in appeal or revision, this is a valid sale; *Jan Ali v. Jan Ali*, 10 *W. R.* 150, and the property cannot be recovered until the sale is set aside for some good cause, such as fraud or collusion, and the suit to set aside such sale must be filed

within one year from the sale becoming final; *Parshadi v. Muhammad*, *I. L. R.* 5 *All.* 578; so, too, where a sale is made under a subsisting decree, although the decree has been satisfied in law by its having been purchased by a trustee for some of the defendants to the suit; *Abul Munsoor v. Abdool Hamid*, *I. L. R.* 2 *Calc.* 98. Property sold under execution proceedings which are, in appeal, held to be barred, may be recovered from the purchaser; *Mina Kumari v. Jagat Sattani*, *I. L. R.* 10 *Calc.* 220; but the suit to set aside the sale must be brought within the time limited by this article; *Mahomed v. Purundhur*, *I. L. R.* 11 *Calc.* 287. A sale by the Collector for arrears of rent due to the *inamdar* is a good sale; *Bajaji v. Pirchand*, *I. L. R.* 13 *Bomb.* 221.

Where property sold is rightly described by its number and contents, but the boundaries are wrongly stated, and the purchaser files a suit, asking to be put in possession of the land within the described boundaries, or that his purchase-money may be returned, this is a suit to set aside the sale, and must be brought within the time limited by this article; *Mahomed Sayad v. Navroji*, *I. L. R.* 10 *Bomb.* 214.

Where a sale is impeached on the ground of fraud, this article is not applicable, but Art. 95, which gives three years from the time the fraud is discovered; *Natha v. Jodha*, *I. L. R.* 6 *All.* 406; *Parekh Ranchor v. Bai Vakhat*, *I. L. R.* 11 *Bomb.* 119; *Bajaji v. Pirchand*, *I. L. R.* 13 *Bomb.* 221; see, also, *Kissen v. Rughoonundun*, 6 *W. R.* 305; *Budrec v. Lokemun*, 3 *Agra*, 89; thus, where one of several co-sharers fraudulently contrived to have an estate sold for arrears of revenue under Act XI of 1859, and purchased it in the name of his son, it was held that this section did not apply; *Bhoobun Chunder v. Rani Soonder*, *I. L. R.* 3 *Calc.* 300; *Venkatapathi v. Subramanya*, *I. L. R.* 9 *Mad.* 457. In one case, however, the Court in Calcutta has gone further, and held that where fraud is merely part of the machinery for getting possession of property, the person defrauded is not limited to three years for bringing his suit, but is in time if he brings it within twelve years; *Chunder Nath v. Tirthanund*, *I. L. R.* 3 *Calc.* 504. On the other hand, it has been held that a suit to set aside a sale

for arrears of Government revenue *must* be brought within one year from the date when the sale becomes final, even though fraud and the fact that no revenue was in arrears were alleged; *Raj Chandra v. Kinoo Khan*, *I. L. R.* 8 *Calc.* 329. This judgment is a short one, and it is difficult to determine how far it was influenced by the fact that the allegations of fraud and no revenue being due were first argued in the High Court. See, also, *Karuppa v. Vasudeva*, *I. L. R.* 6 *Mad.* 148, a case in which the purchaser purchased *bond fide*.

An order of a Collector means an order in the nature of a decree, or made by a Collector or other revenue officer in his judicial capacity; *Sakharam Vitthal v. Collector of Ratnagiri*, 8 *Bomb. H. C. Rep.* 219.

**Art. 13.** *To alter or set aside a decision or order of a Civil Court in any proceeding other than a suit; one year from the date of the final decision or order in the case by a Court competent to determine it finally.*

### Notes.

This is the same as Art. 15 of Act IX of 1871. Act XIV of 1859, Sect. I, Cl. 5, applied to summary decisions or orders of Civil Courts, not established by Royal Charter, and was not limited by the exclusion of decisions or orders made in suits. An application in an execution proceeding is an application in a suit; *Mungul Pershad v. Griji Kant*, 8 *I. A.* 123; and an order in an execution proceeding is an order in a suit; *Ayyasami v. Samiya*, *I. L. R.* 8 *Mad.* 82; *Sivarama v. Subramanya*, *I. L. R.* 9 *Mad.* 57; *Narasimma v. Appala Charlu*, *I. L. R.* 12 *Mad.* 294. These cases and the alteration made by the introduction of Art. 11 render it unnecessary to cite or discuss the contradictory decisions of the Bombay and Calcutta Courts as to the applicability of this article to suits brought to establish claims to property affected by orders under Sect. 246 of Act VIII of 1859. It may, however, be noted that in none of those cases has the effect of the words "other than in a suit" been *discussed*, or judicially *decided*. The High Court in Calcutta do not seem to have noticed the decision in 8 *I. A.* 123, and in the case of *Gowri Prosad v. Ram Ratan*, *I. L. R.* 13 *Calc.* 159, have ruled that, where a Judge has

made an order *in execution of a decree*, directing that a sum recovered in execution should be divided in a certain manner among certain decree-holders, and one of the decree-holders brought a suit against the others to recover from them the amount they had received under the order, the suit being virtually one to set aside the order of the Judge, it fell under this article. In *Vishnu v. Achut*, *I. L. R.* 15 *Bomb.* 438, the High Court at Bombay, pointed out the error in law in this case, and that it was opposed to a previous ruling of the same High Court in *Taponidi v. Mathura*, *I. L. R.* 12 *Calc.* 499. If the summary order made be, under the act by the authority of which it is made, no impediment to bringing a regular suit, it need not be set aside, and this article will not apply, *e. g.*, Act XIX of 1841; *Momeedunissa v. Mahomed Ali*, 1 *W. R.* 40; *Loknarain Singh v. Rani Myna*, 7 *W. R.* 199 (*F. B.*); or if an order under an Act is limited in its operation, as under Act X of 1859, which does not apply to questions of proprietary right, a suit to establish a fact not covered by the order is not affected by this article; *Debi Prasad v. Jafar Ali*, *I. L. R.* 3 *All.* 40. A certificate to collect debts need not be set aside if the plaintiff seeks to obtain possession of property on proof of title, and so in that case this article does not apply, but it does apply if the suit be to cancel the certificate; *Kalea Prosunno v. Srimutty Koylash*, 8 *W. R.* 126. A certificate of heirship only confers the right of management of property, and does not determine the title to the property, consequently a person to whom such a certificate has been refused may sue the holder of the certificate for the property comprised therein without setting it aside, and the suit will be governed by the ordinary rules of limitation respecting the recovery of property; *Bai Kashi v. Jamna*, *I. L. R.* 10 *Bomb.* 449.

Where a Court refuses to entertain an application on the ground that it has no jurisdiction, or for any other reason, the decision of the Court is not an order within the meaning of this article; *Momeedunissa v. Mahomed Ali*, *ubi sup.*; *Kristodas v. Ramkant Roy*, *I. L. R.* 6 *Calc.* 142.

A sanction of a Court to the sale of property under Sect. 18 of Act XL of 1858 is not an order; *Sikher Chund v. Dulputty Singh*, *I. L. R.* 5 *Calc.* 363.

The final order is that of the Court which has jurisdiction to make an order, and not that of an Appellate Court dismissing an appeal therefrom which did not lie; *Oleo Nissa v. Bukdeo Narain*, 7 W. R. 15.

**Art. 14.** *To set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for; one year from the date of the act or order.*

### Notes.

This article is the same as Art. 16 of Act IX of 1871, except that the words "or order" are new.

This article refers to orders and proceedings of a functionary to which by law is given a particular effect in favour of one person, or against another, subject in the regular course to a further judicial proceeding to quash them or set them aside; *Shivaji v. Collector of Ratnagiri*, I. L. R. 11 Bomb. 429; such as an order made by a Collector under Sect. 37 of the Bombay Land Revenue Act, 1879, leasing land to a person other than the person claiming before him to be the owner thereof; although this case is provided by Sect. 135 of the same Act; *Nagu v. Salu*, I. L. R. 15 Bomb. 424. The order must be one which needs to be set aside, otherwise this article will not apply. An order which is *ultra vires* does not need to be set aside; *Bijoy Chand v. Kristo Mohini*, I. L. R. 21 Calc. 626, following the two preceding Bombay cases. If a summary order does not prevent a suit it need not be set aside; *Babaji v. Anna*, 10 Bomb. H. C. Rep. 479. Under the Land Registration Act VII of 1876, no order precludes any person from bringing a suit for possession or declaration of title, consequently such a suit can be brought after the expiration of one year from the date of the order; *Luchmon v. Kanchun*, I. L. R. 10 Calc. 525. The demarcation of land as *veramboke* does not necessarily interfere with the possession of the owner, consequently the order under which such demarcation is made need not be set aside, but the plaintiff can sue for possession within twelve years from the date when he is actually dispossessed; *Krishnamma v. Achayya*, I. L. R. 2 Mad. 306. An order made without authority need not be set aside; such as a second order by



a Talukdari Settlement Officer without the consent of parties, purporting to review an order already made by him under Bombay Act IV of 1868, Sect. 18; *Oghad Odha v. Nag Mula*, P. J. 1881, p. 26; see, also, the cases on the same point under Art. 13.

The act or order must be one recorded in the presence of the parties, or duly communicated to them, as the right to take proceedings to set aside an order or decision pre-supposes the knowledge of an adverse decision which can be complained of; *Anamalai v. Cloete*, I. L. R. 6 Mad. 189; followed in *Seshama v. Sankara*, I. L. R. 12 Mad. 1.

A suit will lie to set aside an order of the Commissioner of Chota Nagpore directing the plaintiff to pay Government revenue at a certain rate, and will come within the provisions of this article; *Kebul Ram v. Government*, 5 W. R. 47.

**Art. 15.** *Against Government to set aside any attachment, lease or transfer of immoveable property by the revenue authorities for arrears of Government revenue; one year from the time when the attachment, lease, or transfer is made.*

### Notes.

This article is the same as Art. 17 of Act IX of 1871, and Cl. 4 of Sect. 1 of Act XIV of 1859.

This article is not applicable to a payment made on account of a clear and admitted liability in order to prevent a sale; *Shadee Lall v. Bhawanee*, 2 N. W. 52. When a *ghatwal* becomes a defaulter it is in the power of the authorities, under Reg. XXIX of 1814, to transfer his tenure to some other person, and that power is not put an end to by the tender of the money due before the transfer is made. A suit to set aside a transfer in such a case must be brought within one year from the date of the transfer being made; *Chittro Narain v. Assistant Commissioner of Sontal Pergunnahs*, 14 W. R. 203.

**Art. 16.** *Against Government to recover money paid under protest in satisfaction of a claim made by the revenue authorities on account of arrears of revenue or on account of demands recoverable as such arrears; one year from the time when the payment is made.*

**Notes.**

This is the same as Art. 18 of Act IX of 1871, and Cl. 4 of Sect. 1 of Act XIV of 1859.

Where a person has paid several years' assessment under protest, he can only recover the payment for the last of such years under this article; *Bhujang v. Collector of Belgaum*, 11 *Bomb. H. C. Rep.* 1; but he can bring a suit to establish his right to hold the land free of assessment within twelve years from the time when his right was first interfered with; *ib.*

*Quære*, whether an objection to the Collector against payment of a revenue assessment, followed by an infructuous appeal to the Commissioner, are sufficient to bring subsequent payments made without further protest within the description of "money paid under protest"; *Kebul Ram v. Government*, 5 *W. R.* 47.

**Art. 17.** *Against Government for compensation for land acquired for public purposes; one year from the date of determining the amount of the compensation.*

**Art. 18.** *Like suit for compensation when the acquisition is not completed; one year from the date of the refusal to complete.*

**Notes.**

These articles are the same as Arts. 19 and 20 of Act IX of 1871.

These articles are confined to suits *against Government* under Act I of 1894. Art. 17 does not apply to a suit by a person who is entitled to the compensation awarded by Government against a person who has wrongfully received it; *Roy Nund v. Mir Abu*, 5 *C. L. R.* 45; Art. 62 would govern such a case, in spite of the decision of *Mitter and Tottenham, JJ.*, to the contrary. See the notes on Art. 62.

Act I of 1894 provides for the making of an award or a reference to the Court by the Collector. If the amount of compensation is determined by the award of the Collector, then the owner must sue within one year from the date of the award to enforce it. If the matter is referred to the Court, a decree will be passed,

If the Collector will not make an award or refer to the Court, the owner will have one year from the date of his refusal to complete to sue for compensation, and twelve years from the date the Collector took possession to recover the land itself. Cases of non-completion are provided for by Sect. 48 of Act 1 of 1894.

**Art. 19.** *For compensation for false imprisonment; one year from the date when the imprisonment ends.*

### Notes.

This is the same as Art 21 of Act. IX of 1871.

Imprisonment consists in the restraint of the liberty of a person, as by confining him in prison, within walls, or by forcibly detaining him in an open space. It must amount to a total restraint of his liberty for some period, however short. A partial restraint, as the prevention of his going in one direction, or in all directions but one, will not constitute an imprisonment; *Bird v. Jones*, 7 Q. B. 742. A restraint by authority submitted to may be imprisonment, although the person is not actually touched; *Grainger v. Hill*, 4 Bing. N. C. 211; *per Willes, J.*, *Warner v. Raddiford*, 4 C. B. N. S. at p. 204. The imprisonment must be by the act, or by the direct order of the defendant, as by directing a policeman to take a person into custody; *Wheeler v. Whiting*, 9 C. and P. 262; *Stonehouse v. Elliott*, 6 T. R. 315. If the defendant merely state facts upon which some one in authority, as a policeman, Magistrate or Court acts, the defendant is not guilty of false imprisonment; *Gosdur v. Elphick*, 4 Ex. 445; *Grinham v. Willey*, 4 H. and N. 496; *Brown v. Chapman*, 6 C. B. 365; in these cases he may be guilty of malicious prosecution, if the charge be false. An action for false imprisonment will also lie for false imprisonment under colour of legal process, where the process has been set aside for irregularity. See, also, the cases cited in *Fisher v. Pearce*, 1 L. R. 9 Bomb. 1.

Compensation for a malicious prosecution is provided for by Art. 23.

In *Fisher v. Pearce*, *ubi sup.* at p. 9, *Scott, J.*, is reported to have stated that the time for bringing a suit ran from "the date of the imprisonment"; it should have been from the time when

the imprisonment *ended*. In this case, however, it did not affect the merits of the case, as the plaintiff was discharged on the same day as he was arrested.

**Art. 20.** *By executors, administrators, or representatives, under Act No. XII of 1855; one year from the date of the death of the person wronged.*

#### Notes.

This is the same as Art. 12 of Act IX of 1871.

Act XII of 1855, Sect. 1, enables the executors, administrators, and representatives of a deceased person to maintain a suit for any wrong committed in the lifetime of such person, *which has occasioned pecuniary loss to his estate*, provided such wrong shall have been committed within one year before his death; consequently executors, &c., cannot sue for any other wrong, except one which has occasioned such pecuniary loss.

Act X of 1885, Sect. 268, and Act V of 1881, Sect. 89, provide what suits do and what do not survive to the executors, &c. This article applies only to those which would not, except for Act XII of 1855, survive to the representative; *Sreemuttee Chunder v. Santo Monee*, 1 W. R. 251; those which survive are governed by the ordinary rules of limitation, modified by Sect. 17, which will also apply under this article if there be no executor, administrator, or representative to sue.

Art. 33 provides for suits under Act XII of 1855 against executors, &c.

**Art. 21.** *By executors, administrators, or representatives under Act XIII of 1855; one year from the date of the death of the person killed.*

#### Notes.

This is the same as Art. 13 of Act IX of 1871.

Act XIII of 1855 gives power to executors, &c., to sue for damages for the benefit of the wife, husband, parent, and child of any person whose death shall have been caused by any wrongful act, neglect, or default which, if death had not ensued, would have entitled the party injured to maintain an action and recover

damages in respect thereof, although the death may have been caused under such circumstances as amount in law to murder or any other crime.

Suits can only be brought under this Act for acts, &c., for which the deceased could have sued if he had not been killed; thus, where a servant is killed in the service of his master, the master is not liable for negligence for which the servant could not have sued him; *Senior v. Ward*, 1 E. and E. 385. The pecuniary loss sustained by the survivors through the death of the deceased is all that can be recovered; *Blake v. Midland Railway Co.*, 18 Q. B. 93.

**Art. 22.** *For compensation for any other injury to the person; one year from the date when the injury is committed.*

#### Notes.

Everything contained under this article would come under Art. 36, but the Legislature has apparently desired that for personal injuries of any description, the limitation should be one year only.

**Art. 23.** *For compensation for a malicious prosecution; one year from the date when the plaintiff is acquitted, or the prosecution is otherwise terminated.*

#### Notes.

This is the same as Art. 23 of Act IX of 1871 with the addition of the words "or the prosecution is otherwise terminated." These words take away the doubt expressed by *Phear, J.*, in *Bhyrud Ohunder v. Mohendro Chuckerbutty*, 13 W. R. 118, as to the time from which limitation would run when the prosecutor dropped the prosecution while it was in the hands of the police. A suit cannot be brought for malicious prosecution while the matter is still pending, because the accused may be convicted; much less when there has been a conviction, because in this case there is a judgment negating the want of reasonable and probable cause.

If the plaintiff is acquitted or discharged, or if the prosecutor withdraw from the prosecution in open Court, there will be no

difficulty in determining the date from which limitation will run; but if he drops it while the police are making enquiries there may be a difficulty in determining that date, unless the police make a report, and on that report the plaintiff is discharged by a Magistrate.

A malicious and untrue statement made by the defendant to a Magistrate, in consequence of which the Magistrate takes up a prosecution against the plaintiff, and the defendant takes no part in prosecuting him, is not a case of malicious prosecution; *Huree Narain v. Ojoodhya Ram*, 10 W. R. 308. It would seem as if the Judges in that case considered that this would be a case of slander, as they held that limitation would run from the time the alleged statement was made.

**Art. 24.** *For compensation for libel; one year from the time when the libel is published.*

**Art. 25.** *For compensation for slander; one year from the time when the words are spoken, or if the words are not actionable in themselves, when the special damage complained of results.*

### Notes.

These are the same as Arts. 24 and 25 of Act IX of 1871, with the addition of the words which follow "spoken" in Art. 25; which, however, are really unnecessary, as the event contemplated by them has been already provided for by Sect. 24, to the notes on which the reader is referred.

It is not necessary that all or the first of the publications should have been within a year; it is sufficient if one publication be proved to have been within one year; *Duke of Brunswick v. Harmer*, 14 Q. B. 185.

Proof that the defamatory matter, if written, is in the defendant's handwriting, is said to be presumptive evidence of publication, so as to throw the *onus* of proving non-publication on him; *R. v. Beare*, 1 Ld. Raym. 417; *Lamb's Case*, 9 Rep. 596; but a libel may be found under circumstances which preclude such presumption. The publication may also be by selling the libel, distributing it gratis, reading it to others (if he knew the tendency of it before), or by sending it, and having it delivered to another

person; *Bac. Abr. Libel*, B. 2, 1 *Hawk. c.* 73, s. 11. Evidence of the libel having been purchased in a bookseller's shop, or at a newspaper office, of a servant there, in the course of business, will sustain a count charging the master with having published it; *Bac. Abr. Libel*, B. 2; *R. v. Almond*, 5 *Bur.* 2686.

Printing a libel, unless qualified by circumstances, is said to be *prima facie*, a publishing; for it must be delivered to the compositors and other subordinate workmen; *Baldwin v. Elphinstone*, 2 *W. Bl.* 1038; but this proposition is denied in *Watts v. Fraser*, 7 *A. and E.* 223. Indeed, the mechanical work of compositors, and the division of labour among them, almost preclude the presumption that any of them have obtained any knowledge of the sense of what they were composing. If the manuscript of the libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there is no evidence to shew that the printing and publishing were by the direction of the defendant; *R. v. Lovett*, 9 *C. and P.* 462.

There is no publication, however, if the libel be addressed to the party himself; *Phillips v. Jansen*, 2 *Esp.* 624; *Komul Chunder v. Nobin Chunder*, 10 *W. R.* 184; *Emp. v. Taki Husain*, 1 *L. R.* 7 *All.* 205; but giving a letter to be copied is sufficient publication; *Heckford v. Galstin*, 2 *Hyde*, 274; so is sending one to a man's wife; *Wenman v. Aske*, 13 *C. B.* 836; but a disclosure of a libel by the defendant to his wife is not a publication; *Wennhak v. Morgan*, 20 *Q. B. D.* 635.

As to the right to sue for successive injuries, see the note to Sect. 24.

**Art. 26.** *For compensation for loss of service occasioned by the seduction of plaintiff's servant or daughter; one year from the time when the loss occurs.*

### Notes.

This article is the same as Art. 27 of Act IX of 1871.

In *Ram Lal v. Tulu Ram*, 1 *L. R.* 4 *All.* 971, *Oldfield, J.*, seemed to doubt whether a Hindu father can bring a suit for the

loss of his daughter's service through seduction, but surely such a father has by law and custom as much a right to the services of a daughter who is living in his house and performing household duties for him as an English father whose daughter *practically* does not serve him, except sufficiently to enable the law to award compensation to him. *Stuart, C. J.*, differed from *Oldfield, J.*

**Art. 27.** *For compensation for inducing a person to break a contract with the plaintiff; one year from the date of the breach.*

### Notes.

This article is the same as Art. 28 of Act IX of 1872.

There seem to be only two cases reported in India on the circumstances under which a suit may be brought against one who induces another to break a contract; *Mahomed Kazem v. Forbes*, 5 *W. R.* 277 and 7 *W. R.* 401; and *Mahomed Kazem v. Forbes*, 8 *W. R.* 257. These suits were brought under Act X of 1836, Sect. 3. For the principles which govern such suits, irrespective of statutory enactment, see *Lumley v. Gye*, 2 *E. and B.* 216.

**Art. 28.** *For compensation for an illegal, irregular, or excessive distress; one year from the date of the distress.*

**Art. 29.** *For compensation for wrongful seizure of moveable property under legal process; one year from the date of the seizure.*

### Notes.

These articles are the same as Arts. 29 and 30 of Act IX of 1871.

A suit to recover damages for the seizure of the plaintiff's bullocks in execution under a decree against another person would come under Art. 29; *Ram Singh v. Bhattro Manjee*, 24 *W. R.* 298; so would a suit to recover money, or rather an equivalent amount of money, wrongfully taken under a decree, together with loss of gain or interest on the money; *Jaggivan Javherdas v. Gulam Jilani*, 1 *L. R.* 8 *Bomb.* 17. When the Talukdari Settlement Officer used the power given to him by Sect. 15 of Bombay Act VI of 1862 to seize some moveables belonging to the plaintiff in satisfaction of the rent which that officer alleged to be due, and



the plaintiff, disputing his liability to pay the rent, sued for the value of the articles seized; it was held that the suit came under this Art.; *Makwana v. The Talukdari Settlement Officer, P. J.*, 1892, p. 32.

The defendant attached moveable property, and the plaintiffs thereupon obtained an order raising the attachment. The defendant then bought a suit to maintain the attachment, and obtained an injunction by which the attachment was maintained till the hearing of the suit, which was eventually dismissed: held that a suit for damages for the maintenance of the attachment fell under Art. 42 and not under Art. 29; *Haji Pir v. Thakur Dass, Panj. Rec.* No. 40 of 1881.

An order of Court for payment of money is not legal process, and if made under a misapprehension of facts, and money is received thereunder, the money is not seized, and a suit to rectify the error does not fall under Art. 29; *Rupabai v. Andimulam*, *I. L. R.* 11 *Mad.* 345.

#### Part V.—Two years.

**Art. 30.** *Against a carrier for compensation for losing or injuring goods; two years from the date when the loss or injury occurs.*

**Art. 31.** *Against a carrier for compensation for delay in delivering goods; two years from the date when the goods ought to be delivered.*

#### Notes.

These articles are the same as Arts. 36 and 37 of Act IX of 1871.

Where there is a contract between the plaintiff and the carrier, Art. 30 does not apply, but Art. 115; *British India S. N. Co. v. Hajee Mahomed*, *I. L. R.* 3 *Mad.* 107, *Hassaji v. East India Railway Co.*, *I. L. R.* 5 *Mad.* 388; *Mohansing Chawan v. Conder*, *I. L. R.* 7 *Bomb.* 478; *Danmull v. British India S. N. Co.*, *I. L. R.* 12 *Calc.* 477; this article applies to suits for compensation for loss or damage to goods arising from mal-feasance, mis-feasance,

or non-feasance independent of contract; *British India S. N. Co. v. Hajee Mahomed*, *ubi sup.*; followed in *Kalu Ram v. Madras Railway Co.*, *I. L. R. 3 Mad. 240*. If the defendant wishes to avail himself of the benefit of Art. 30 on the ground that goods have been lost, it is incumbent on him to prove the loss; *Mohansing Chawan v. Conder*, *ubi sup.*; but where a carrier is sued for breach of contract to deliver goods, and the suit is brought within three years, it is not competent for him to set up the case that they were lost by him, so as to bring it within this article; *British India S. N. Co. v. Hajee Mahomed*, *ubi sup.*; followed in *Danmull v. British India S. N. Co.*, *ubi sup.* The cases in Madras and Calcutta have been dissented from by the Appeal Court in Bombay in *G. I. P. Ry. Co. v. Raisett*, not yet reported, but the opinion was expressed that if any change is to be made in the law as at present expounded, it must be by Legislative action.

**Art. 32.** *Against one who, having a right to use property for specific purposes, perverts it to other purposes; two years from the date when the perversion first becomes known to the person injured thereby.*

### Notes.

This article corresponds with Art. 38 of Act IX of 1871, but the time from which limitation runs has been altered; under the old Act it was from the time of the perversion.

This does not apply to an improper dealing with property, or to a perversion of it from its original use, when such perversion is a breach of contract; *Kedarnath Nag v. Khetturpaul*, *I. L. R. 6 Calc. 34*; it applies to cases which amount to torts. A suit by a *zamindar* against an occupancy tenant seeking to restrain him from converting arable land into a grove is governed by this article; *Gungadhar v. Zahuriya*, *I. L. R. 8 All. 446*.

This article, further, applies to cases where a defendant, having a right to use property for certain specific purposes, perverts it to other uses and thereby causes injury; not to cases where a defendant does acts to property over which he has no right whatever; *Mushraf Ali v. Iftikhar Husain*, *I. L. R. 10 All. 634*.

**Art. 33.** *Under Act XII of 1855, against an executor, administrator, or other representative; two years from the date when the wrong complained of is done.*

### Notes.

This article is the same as Art. 39 of Act IX of 1871.

Act XII of 1855 permits the executors, &c., of a deceased person to be sued for any wrong committed by him in his lifetime, for which he would have been subject to an action, provided such wrong is committed within a year before his death. The term of limitation may be modified in appropriate cases by Sect. 17.

Art. 20 provides for suits by executors, &c.

**Art. 34.** *For the recovery of a wife; two years from the date when possession is demanded and refused.*

**Art. 35.** *For the restitution of conjugal rights; two years from the date when restitution is demanded and is refused by the husband or wife, being of full age and sound mind.*

### Notes.

These articles correspond with Arts. 41 and 42 of Act IX of 1871, but to Art. 35 the words after "refused" have been added, and their effect is to provide that no refusal of a husband or wife who is a minor or insane shall form a starting point for limitation. Art. 35 applies to all cases of the restitution of conjugal rights except those which arise under the Divorce Act. IV of 1869.

The right of a husband to the possession of his wife is one which continues so long as the marriage bond continues, consequently it has been held that so often as he chooses to demand possession of her, or restitution of conjugal rights, and is refused, so often would a new cause of action arise. The practical result of this is that there would be no limitation to his bringing a suit for possession or restitution so long as he brought it within two years from some demand and refusal, *Panj. Rec.* No. 60 of 1879; followed in *Khair-ud-din v. Budhi*, *Panj. Rec.* No. 80 of 1892; and *Hemchund Hurjivan v. Shiv*, *I. L. R.* 16 *Bomb.* 715, n.,

where it was laid down that acts falling under these two articles are continuing wrongs, giving rise to recurring causes of action on demand and refusal. This was followed by *Jardine, J.*, in *Bai Sari, v. Sankla, I. L. R. 16 Bomb. 714*, in which *Telang, J.*, concurred in confirming the decree of the lower Court, but did not express his concurrence in the reason given for such confirmation.

The application of this article has also been discussed in *Binda v. Kaunsilia, I. L. R. 13 All. 126*. In this case the Court held that, among Hindus and Mahomedans, demand and refusal was not necessary before bringing a suit for recovery of a wife or restitution of conjugal rights, and consequently, as a limitation act cannot alter substantive law, that such suits were not governed by these Articles, but by Art. 120. The adoption of this last mentioned Article, however, does not make the matter any simpler, for in such cases how is "the time when the right to sue accrues," to be determined? It is the custom among many castes for the wife to pay visits to her father's house at stated seasons and for certain periods. If then the wife at the persuasion of her father stays a longer time, it seems impossible to believe that any Court would hold that the mere staying after such periods had elapsed, even for a considerable time, would amount to detention of the wife by her father, or refusal of conjugal rights by the wife. In fact, the remaining of the wife at her father's house might have been with the actual consent of her husband. Consequently, under Art. 120, the Court must have some fact proved which would indicate the intention with which the wife was absent from her husband, and as a matter of practice that fact would ordinarily be a request by the husband to the wife to return, and to her father to return his daughter, and refusal or neglect to comply with the demand. It is impossible to say that a thing has been refused or retained which might at any time have been had by asking for it. Of course, a wife may have been carried off by force, but that seldom happens, and the ordinary case is that of a wife simply leaving her husband's house; and while she is away without any manifested intention not to return, limitation would not run, because the husband would have no cause of action; and under

these two Articles, even if there was intention not to return, the continuing away, or retention, of the wife would be a continuing wrong, and limitation would not run until demand and refusal; but when a demand is made and a refusal given, limitation would at once begin to run, and any suit would be absolutely barred after two years. If this contention be correct, the rulings before referred to in Bombay and the Punjab are based upon an erroneous view of the law. The intention of the Legislature in these two Articles would seem to be, not to make new substantive law, but to point out a period of time after which no suit can be brought for the recovery of a wife or the restitution of conjugal rights. In the case of there being no demand and refusal to shew the intention with which the wife is retained or remains away, but that intention is manifested by other evidence, then the "right to sue" would accrue when the intention was first manifested, and, if Art. 120 applies under such circumstances, the right to sue would be barred in six years from the time when the intention was first manifested. The same principles would apply if the wife was the party seeking from her husband the restitution of conjugal rights.

**Art. 36.** *For compensation for any mal-feasance, mis-feasance, or non-feasance independent of contract and not herein specially provided for; two years from the date when the mal-feasance, mis-feasance, or non-feasance takes place.*

### Notes.

This article corresponds to Art. 40 of IX of 1871. In that article, however, the word "wrong" was inserted before "mal-feasance" in the first column, and the time ran from the date when "the wrong is done or the default happens."

This article applies to all cases of what are known in English law as torts, except in certain well-defined instances provided for by other articles in this Schedule and a suit for compensation for damage caused by a collision on the high seas must be brought within two years from the date on which the damage was done; *Essoo Bhayaji v. S. S. Savitri*, I. L. R. 11 Bomb. 183; but it does not apply to cases otherwise specially provided for by

this Act; *Shurnomoyes v. Pattarri Sirkar*, I. L. R. 4 Cal. 625. In this case, the defendant having under a decree ejected the plaintiff from certain property, carried away certain crops which were on the land, to which he was not entitled under the decree. The decree was subsequently reversed, and the plaintiff then sued for the value of the crops so taken, and it was held that this article did not apply, but Art. 109. In a subsequent case, however, where standing crops were wrongfully removed, this article was held to apply, but in this case, the suit was in time under this article, and there was no necessity to look for another under which limitation might have been saved; *Pandah Gazi v. Jennuddi*, ib. 665. Where the mal-feasance, &c., involves a trespass to land this article would not apply, but Art. 39; *Narasimmacharya v. Ragupathyacharya*, I. L. R. 6 Mad. 176.

Where the mal-feasance is a false and malicious complaint to a Magistrate in consequence of which he places property under attachment, and such property becomes damaged, and the plaintiff sues the tort-feasor for compensation for such damage, limitation runs from the date of the complaint; *Mudvirappa v. Fakirappa*, I. L. R. 7 Bomb. 427.

As this article applies to tortious acts independent of contract, a suit by the purchaser at an auction sale in execution of a decree against the judgment-creditor, for compensation for a misdescription of the boundaries of the land sold, will not be affected by its provisions; *Mahomed Sayad v. Naoroji*, I. L. R. 10 Bomb. 214.

#### Part VI.—Three years.

**Art. 37.** *For compensation for obstructing a way or a water-course; three years from the date of the obstruction.*

**Art. 38.** *For compensation for diverting a water-course; three years from the date of the diversion.*

#### Notes.

These articles correspond to Arts. 31 and 32 of Act IX of 1871, but the limitation is now *three* years instead of two, and it has

been made clear that they apply to suits for compensation and not to declarations of right, or removal of obstructions.

Continuing obstructions to the flow of water (and also to the use of a way) are in the nature of continuing nuisances, as to which the cause of action is renewed *de die in diem* so long as the obstructions continue; see Sect. 23; *Rajrup Koer v. Syed Abdul*, 7 I. A. 240, at p. 248, S. C. I. L. R. 6 Calc. 294; see, also, *Ponnusawmi Tewar v. Collector of Madura*, 5 Mad. H. C. Rep. 6, at p. 24. Consequently compensation for obstructions and diversions can be recovered at any time within three years from any date at which there has been an obstruction, &c., provided that compensation cannot be recovered for a period exceeding three years before the filing of the suit. Suits for removal of the obstruction and recovery of the use of a water-course or way might come under Art. 144, if the way or water-course was the property of the plaintiff; or under Sect. 26, or the general law of prescription independently of that section, if the plaintiff was only entitled to the way or water-course as an easement.

**Art. 39.** *For compensation for trespass upon immoveable property; three years from the date of the trespass.*

### Notes.

This is substantially the same as Art. 43 of Act IX of 1871, but applies to the recovery of compensation only; the former article was not clear on the point, but it was held to apply only to the recovery of damages for a trespass, in *Joharmal v. Municipality of Ahmednagar*, I. L. R. 6 Bomb. 580.

A trespass is a continuous wrong, continuing from its inception until the possession of the trespasser comes to an end, and compensation may be claimed for any damage which accrues within three years of suit; *Narasimmacharya v. Bagupathyacharya*, I. L. R. 6 Mad. 176.

**Art. 40.** *For compensation for infringing copyright or any other exclusive privilege; three years from the date of the infringement.*

## Notes.

This article corresponds to Art. 11 of Act IX of 1871, but the word "compensation" has been substituted for "damages," and the period of limitation has been increased from one to three years.

The change in the wording of this article takes away the doubt raised in *Kinmond v. Jackson*, I. L. R. 3 Calc. 17; whether a longer period of limitation could be obtained by asking for an account instead of damages.

A privilege is "*jus singulare, seu lex privata, quæ uni homini vel loco conceditur*," 7 Bac. Ab. 112, and meets the case of an individual author or inventor, but does not include members of classes in the community, such as *joshis*, who as members of such classes, are vested with rights against the infringement of which the law guards them; *Damodar Abaji v. Martand Apaji*, P. J. 1875, p. 293.

**Art. 41.** *To restrain waste; three years from the date when the waste begins.*

## Notes.

This is an entirely new article. The wording shews that a new cause of action does not arise from successive acts of waste of the same kind, but it would seem reasonable that the existence of one form of waste acquiesced in should not prevent a new period of limitation running in respect of a new form of waste.

**Art. 42.** *For compensation for injury caused by an injunction wrongfully obtained; three years from the date when the injunction ceases.*

This is an entirely new article. Suits under this article can only be brought in cases in which the Civil Court has not awarded compensation under Sect. 497 of Act XIV of 1882.

See *Haji Pir v. Thakur Das*, Panj. Rec. No. 40 of 1881, under Art. 29.

**Art. 43.** *Under the Indian Succession Act, 1865, Section 320 or 321, or under the Probate and Administration Act, 1881, Section 139 or 140, to compel a refund by a person to whom an executor or*



*administrator has paid a legacy or distributed assets; three years from the date of the payment or distribution.*

### Notes.

This article is newly introduced into the Limitation Act. It formerly appeared in Sect. 321 of Act X of 1865, but the limitation then was two years after the death of the testator or one year after the payment of the legacy. The reference to the Probate and Administration Act, 1881, is introduced by Sect. 156 of that Act.

**Art. 44.** *By a ward who has attained majority, to set aside a sale by his guardian; three years from the date when the ward attains majority.*

### Notes.

This is a new article. It does not apply where the person purporting to act as guardian is not the minor's guardian either in fact or in law; *Chandu v. Anant Ram*, *Panj. Rec.* No. 135 of 1892.

Where a guardian to a Hindu minor sells property belonging to the minor, subsequently to which the minor dies without attaining his majority, and a minor boy is adopted in the place of the deceased, and has the same guardian, the adopted son can sue to set aside the sale within three years of his attaining his majority; *Prosonno Nath v. Afzolonnessa*, *I. L. R.* 4 *Calc.* 523, at p. 526; but *quære*, whether this case would come under this article, as the sale was not made by any one *as the guardian* of the plaintiff. Where a transaction or instrument is done or made by a guardian with authority, and the transaction or instrument has immediate operation given to it so as to affect immoveable property, proceedings should be taken to set aside the transaction or instrument within the time allowed by law for that specific purpose; *Rajhubai v. Bhikyu Lal*, *I. L. R.* 12 *Calc.* 69; *Ghulam v. Ajab Gul*, *Panj. Rec.* No. 57 of 1891.

Where a plaintiff sues for redemption, and a defendant sets up a sale of the equity of redemption by the plaintiff's natural

guardian which the plaintiff impugns, this article does not apply, as the setting aside the sale is subservient to the suit for redemption; *Bhagvant v. Kondi*, I. L. R. 14 Bomb. 279.

**Art. 45.** *To contest an award under any of the following Regulations of the Bengal Code :—*

*VII of 1822,*

*IX of 1825, and*

*IX of 1833; three years from the date of the final award or order in the case.*

**Art. 46.** *By a party bound by such award to recover any property comprised therein; three years from the date of the final award or order in the case.*

### Notes.

These two articles are the same as Arts. 44 and 45 of Act IX of 1871.

Under Art. 45 any person who wishes to contest an award, whether bound by it or not, must bring his suit within the three years. If he can get what he wants without contesting it, the article will not apply. Art. 46 applies only to those who are bound by the award.

*Award.*—An award means an adjudication on rights as between rival claimants made by a Revenue Officer acting judicially under the Regulations mentioned; *Hurree Mohun v. Government*, 2 N. W. 226; *Madho Singh v. Jehangeer*, 2 Agra, 229; *Sreechund v. Mullick*, 9 W. R. 564; and it supposes a contest between the parties, and a decision after a proper investigation into the points in dispute between them; the finding of a Collector that a party had been in possession more than a year, that fact not being disputed, is not an award under Reg. VII of 1822; *Radha Pershad v. Ram Jeewun*, 11 W. R. 389; an entry made by a settlement officer in the report of a co-sharer, and on the strength of the report of the *patwari* and *Canoongoe* in the absence of the party against whom it is made, is not an award; *Kinhar v. Gokurun*, 3 Agra, 316; nor is there any award when the Assistant Collector, not being able to come to any decision, refers the whole matter

to the Collector, and he, without hearing the parties, after reading the evidence taken by the Assistant Collector, passes an order; *Bhaoni v. Maharaj Singh*, 1 L. R. 3 All. 738; see, also, *Runsee v. Ramsookh*, 3 Agra, 384; *Ramaishar v. Shaiva*, 2 Agra, 8.

*Final Award or Order.*—Where a survey award was unsuccessfully appealed to the Deputy Collector and then to the Board of Revenue, time begins to run from the date of the order of the Board; *Kissen Chunder v. Mahomed Afzul*, 10 W. R. 51; 10 Ben. L. R. A. C. 11. A and B were similarly affected by a survey award, A appealed but B did not; it was held that B could not compute the period from which limitation would run from the date of the order on A's appeal; *Tulsiram Das v. Mahomed Afzul*, 1 Ben. L. R. A. C. 12; S. C. 10 W. R. 48. Parties having claimed proprietary rights, and the settlement officer having ordered them to be recorded as hereditary cultivators, a suit to establish proprietary rights must be brought within three years from the date of the order; *Sardar Khan v. Ohundoo*, 1 Agra, 228.

*Such award* in Art. 46 means an award of the description mentioned in Art. 45, and no other; *Lachman v. Atma, Panj. Rec.* No. 25 of 1833.

*Time.*—Where a plaintiff sues to set aside a survey award, and to recover possession alleging dispossession at a date subsequent to the award, these clauses do not apply, but he has twelve years from the date of dispossession within which to sue; *Mozuffur Ali v. Grish Chunder*, 10 W. R. 71.

*Recover any Property.*—Where a person has remained in possession, his suit is not to recover possession, but to obtain a declaration of his right to remain in possession, and Art. 46 will not apply; *Mohima Chunder v. Raj Coomar*, 10 W. R. 22.

*Bound by.*—A co-proprietor of a joint and undivided estate is bound by a survey award and compromise of which notice was served upon the joint family, and to which all the other co-proprietors were parties, although he may not personally have had notice of the proceedings; *Hur Lal v. Suruj Narain*, 3 W. R. 7.

An order that a particular person is entitled to a settlement of certain lands is no ground for debarring a third person who was no party to the settlement proceedings in any stage from bringing a suit after three years to establish his title to the said lands; *Kanto Prosad v. Asad Ali*, 5 C. L. R. 452. This article does not apply to a suit by a third person to amend a settlement, and establish the rights of persons not previously before the Collector; *Himmat v. The Collector of Bijour*, 2 Agra, 259.

These articles will not enable a person to come in within three years from the date of an award, and recover possession of lands in respect of which his suit is barred by other provisions of the law of limitation; *Beerchund v. Ramgutti*, 8 W. R. 209; *Moula Buksh v. Koshoram Pandey*, 10 W. R. 249.

So long as the proprietary right of the *zamindar* is formally recognized by the Revenue authorities (e.g., by temporary settlement) and no permanent settlement is made with any one, time will not run against the claim to a permanent settlement; *Kristo Chunder v. Kashee Kishore*, 17 W. R. 145; *Bissessuree Dossee v. Kalee Koomar*, 18 W. R. 198; *Kristo Chunder v. Shama Soonduree*, 22 W. R. 520.

**Art. 47.** *By any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chapter XL, or the Bombay Mámlatdárs' Courts Act, or by any one claiming under such person, to recover the property comprised in such order; three years from the date of the final order in the case.*

### Notes.

This article is in substitution for Art. 46 of Act IX of 1871.

The Criminal Procedure Code referred to in this article is Act X of 1872. The chapter of the present Code of 1882, to which this article applies, is Chap. XII. The Bombay Mámlatdárs' Courts Act is Bombay Act III of 1876, which repeals Bombay Act V of 1864. This article does not contemplate the setting aside of an order but refers to a suit for possession in spite of the order by a person bound by it.

This article applies only to persons bound by the orders to which it refers or by persons claiming under them, and does not apply to a person claiming against both of the parties between whom the order is made. A *zamindar* who lets his estate in farm for a term of years, and so delegates the whole of his rights, privileges, and immunities to another person, becomes himself bound by an adverse decision in respect of possession to which the farmer was a party; *Lekhraj Roy v. Court of Wards*, 14 *W. R.* 395; but *quere*, whether this ruling can be supported. This article does not apply in favour of persons who get the order for possession set aside and then go into possession themselves, when a suit is brought to oust them, although both plaintiff and defendants may have been parties to the original order for possession; *Aukhil Chunder v. Mirza Delawar*, 6 *C. L. R.* 93; see, also, the notes to Arts. 45 and 46. Nor does this article apply where the party has no legal right to possession at the time the order is made against him, but subsequently acquires that right; *Borai Chand v. Samiruddin*, 1 *L. R.* 19 *Calc.* 646.

*Order.*—There must be an order declaring one of the parties entitled to possession. A Magistrate, who, finding himself unable to determine who was in actual possession of certain lands, placed them in charge of the Sub-Magistrate, does not make an order respecting the possession of property; *Akilandamal v. Periasami*, 1 *L. R.* 1 *Mad.* 309, and consequently this article is inapplicable. A *Mámlatdár*, who dismisses a plaintiff's claim for possession for lack of proof, makes an order confirming the defendant in possession; *Ohinto v. Ganesh*, *P. J.* 1883, p. 131. In cases of possession decided by a Magistrate, the date from which limitation runs is that of the order made by the Magistrate, not that of the Judge by whom it may be confirmed; *Kangali Churn v. Zomurrudonnissa*, 1 *L. R.* 6 *Calc.* 709.

*Property.*—This article applies to moveable as well as immovable property; *Kangali Churn v. Zomurrudonnissa*, *ubi sup.*

Where a *Mámlatdár* has made an order respecting the possession of certain portions of joint property, and a party bound by that order subsequently sues for partition, this is not a suit to

recover the property in respect of which the order was made, and this article does not apply; *Bhaguji v. Aniaba*, I. L. R. 5 Bomb. 25; *Shivram v. Narayan*, *ib.* 27; and a suit to partition property, the whole of which has been the subject of an order for possession, is not a suit to recover the property in respect of which the order was made; *Parshram, v. Rakhma*, I. L. R. 15 Bomb. 299. A Māmlatdār's order dispossessing one person, and giving possession to another, does not destroy the title of the former; consequently if the former, subsequently to the order, gets into possession again, any person claiming under the latter must prove his title to the land irrespective of any question of limitation arising under this article; *ib.*

**Art. 48.** *For specific moveable property lost, or acquired by theft, or dishonest misappropriation or conversion, or for compensation for wrongfully taking or detaining the same; three years from the date when the person having the right to the possession of the property first learns in whose possession it is.*

**Art. 49.** *For other specific moveable property, or for compensation for wrongfully taking or injuring or wrongfully detaining the same; three years from the date when the property is wrongfully taken or injured, or when the detainer's possession becomes unlawful.*

### Notes.

These two articles cover the ground included in Arts. 26, 33, 34, 35, 47 and 48 of Act IX of 1871, but increase the time for limitation from one year under Art. 26 (taking or damaging moveable property), and two years under Arts. 33, 34 and 35 (detaining title deeds or other moveable property and specific recovery of moveable property not provided for by Arts. 47 and 48), to three years. The present articles provide a period or limitation, both for the recovery of the property itself, and for compensation for its injury or conversion.

Under Art. 48, limitation runs from the time when the plaintiff first learnt in whose possession his property was, so that the continued possession of the wrong-doer does not furnish *de die in diem* a new starting-point for limitation, nor does it under Art.

49, for the starting-point thereunder is either the date of the actual taking, or the date when the detainer becomes unlawful.

Art. 49 does not apply to a suit to recover as heiress the moveable property of the deceased; *Mahomed Riasat v. Mussamut Hasin*, 20 *I. A.* 155; *I. L. R.* 121 *Calc.* 57.

*Specific moveable property.*—Standing crops are immoveable property; *Pandah Gaji v. Jenmuddi*, *I. L. R.* 4 *Calc.* 665; *i. e.*, while they are standing, but surely by every principle of law if they are cut they become moveable property, and if carried off the land and unlawfully detained a suit for compensation would come under these two articles; and it was so determined in *Kashidas v. B. B. & C. I. Railway Co.* 6 *Bomb. H. C. R. A. C. J.* 114. Where crops are cut and stored they are moveable property; *Munnoo v. Jhandar*, 3 *Agra*, 389.

The property must be *specific*, *i. e.*, capable of being recovered *in specie*, consequently money cannot come under these two articles ordinarily; see the judgment of *West, J.*, in *Jagjiwan Javherdas v. Gulam Jilani*, *I. L. R.* 8 *Bomb.* at p. 19. The High Court at Allahabad has, however, apparently missed sight of the word “specific,” and applied Art. 48 to a case where the plaintiff gave the defendant a certain sum of money to be handed to the plaintiff’s family; the defendant did not deliver the money, and when asked by the plaintiff denied ever having received it, holding that for a suit to recover the amount so handed to the defendant, limitation ran from the date when the plaintiff first learnt that the defendant had not paid over the money as directed; *Rameshar v. Mata Bhikh*, *I. L. R.* 5 *All.* 341. The compensation mentioned in Art. 49 must be compensation for injury, &c., to property the return of which is, or can be, sought *in specie*; *Essoo Bhayaji v. S. S. Savitri*, *I. L. R.* 11 *Bomb.* 133. The suit may be brought to recover the property itself together with damages; or, the property being destroyed, or recovered otherwise, to recover damages only; but in any case it must be in respect of property, the right of possession or the ownership of which is in the plaintiff and which has at some time been taken possession of by the defendant. A suit for compensation for damage done to a ship of the plaintiff

by another ship on the high seas does not fall under Art. 46, but under Art. 36; *ib.*; see, also, *Pasanha v. Madras Deposit and Benefit Society*, *I. L. R.* 11 *Mad.* 333.

A suit for compensation for injury to land resulting in the loss of crops is not a suit in respect of personal property; *Raj Chunder Joy Kishen*, 4 *W. R.* 76.

The claim of a *tikait Maharaj* to the custody of the pictures of a *thakur* of whom he is the lineal descendant falls under Art. 124 or Art. 144 rather than under this article; *Goswami Shri Girdharji v. Romanlalji*, *I. L. R.* 17 *Calc.* 3 (*P. C.*).

Under Art. 48, there must be theft, dishonest misappropriation or conversion. Where a deceased person had wrongfully converted goods, and the defendant, who had sold them as the agent of the deceased, held the proceeds as the agent for his representative; it was held that Art. 48 of Act IX of 1871 did not apply, but that this was a suit for which no limitation had been provided; *Gurudas Pyne v. Ram Narain*, *I. L. R.* 10 *Calc.* 806 (*P. C.*)

*Detainer becoming unlawful.*—A testator bequeathed certain specific moveable property to A which A sold to C. B obtained a certificate under Act XXVII of 1860 and took possession of the property. The certificate was cancelled and B ordered to hand the property to A or his vendee, on the 19th August 1873. C instituted his suit on the 22nd March 1878. It was held that this case fell under Art. 49 and that B's detainer became unlawful on the 19th August 1873; *Issur v. Juggut*, *I. L. R.* 9 *Calc.* 79. B sold moveable and immoveable property to A, but instead of putting him in possession, sold it to C and put him in possession. A brought a suit for specific performance against B and C in which he obtained a decree and C still continuing in possession of the moveable property, A brought a suit against him to recover it. It was held that C's detainer first became unlawful on the date of the final decree (in appeal) for specific performance; *Dhondiba v. Ramchandra*, *I. L. R.* 5 *Bomb.* 554.

After the redemption of a mortgage, the title deeds of the mortgaged premises remained with the mortgagee who, on demand for their return, refused to give them up; it was held that the



case fell under Act 49, and that time began to run from the date of a lawful demand for the deeds, after which their retention became unlawful; *Subbakka v. Marsippakkala*, 1 L. R. 15 Mad. 157. Title deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant in 1859, who held them without knowledge of the fraud to secure the repayment of a loan. The plaintiffs on discovering the loss of the deeds, in 1882, demanded the deeds of the defendant, and on his refusal to give them up brought an action against him. It was held that until demand and refusal to give the deeds to the real owners, they had no right of action against which the statute would run; *Spackman v. Foster*, 11 Q. B. D. 99. For a similar case in which the same decision was come to, see *Miller v. Dell* [1891] 1 Q. B. 468.

**Art. 50.** *For the hire of animals, vehicles, boats or household furniture; three years from the date when the hire becomes payable.*

#### Notes.

This article is the same as Art. 49 of Act IX of 1871.

**Art. 51.** *For the balance of money advanced in payment of goods to be delivered; three years from the date when the goods ought to be delivered.*

#### Notes.

This article is the same as Art. 50 of Act IX of 1871.

This article is practically the same in effect as Art. 97, the only difference being that in the present case there may be only a partial failure of consideration, in the other the whole consideration, fails. Cases coming under this article would also come under Art. 97. If there be no date specifically fixed for the delivery of the goods, evidence must be taken as to the time when such goods ought to be delivered; *Boiddonath v. Lakunnissa*, 7 W. R. 164. The facts assumed by the Court, to which this principle was therein applied, would come under Art. 55. If no time is fixed, either directly or impliedly, then a reasonable time must be allowed, and there would probably be no failure of consi-

deration until after demand of the goods, and refusal or neglect to supply them, and in this case Art. 97 or Art. 115 would apply.

**Art. 52.** *For the price of goods sold and delivered, where no fixed period of credit is agreed upon; three years from the date of the delivery of the goods.*

**Art. 53.** *For the price of goods sold and delivered to be paid for after the expiry of a fixed period of credit; three years from the date when the period of credit expires.*

**Art. 54.** *For the price of goods sold and delivered to be paid for by a bill of exchange, no such bill being given; three years from the date when the period of the proposed bill elapses.*

### Notes.

These articles are the same as Arts. 51, 52 and 53 of Act IX of 1871.

Arts. 53 and 52 are a legislative enactment of the ruling in *Satcovee v. Kristo Bangal*, 11 W. R. 529, where it was held that where goods were supplied from time to time, no fixed period of credit being agreed upon, the cause of action in respect of each supply must be taken to arise on the date when each parcel of goods was supplied, but if there be an implied contract that all goods supplied within a certain period are to be paid for at the expiration of that period, then limitation will run from the expiry of the period of credit.

If goods are sold on six months' credit, and payment is to be made then by a bill at two or three months at the purchaser's option, this is in fact a nine months' credit, and limitation will not commence to run till the end of the nine months; *Helps v. Winterbottom*, 2 B and Ad. 431.

There is no distinction under this Act between goods sold by retail and those sold wholesale.

**Art. 55.** *For the price of trees or growing crops sold by the plaintiff to the defendant where no fixed period of credit is agreed upon; three years from the date of the sale.*

**Notes.**

This article is the same as Art. 54 of Act IX of 1871.

This article overrules the decision in *Boiddonath v. Lalunnissa*, 7 W. R. 164, as to the applicability of the principles laid down therein to the facts assumed by the Court.

**Art. 56.** *For the price of work done by the plaintiff for the defendant at his request, where no time has been fixed for payment; three years from the date when the work is done.*

**Notes.**

This article is the same as Art. 55 of Act IX of 1871.

A suit by a goldsmith to recover the price of his labour in making ornaments falls under this article, and not under Art. 7; *Vishnu v. Gopal*, P. J. 1885, p. 252.

Work done by an attorney or vakil is provided for by Art. 84.

A zamindar who, at the request of the defendants, repairs a tank is entitled to recover from them their share of the cost as work done at their request within three years from the time when the work is completed; *Sundaram v. Sankara*, I. L. R. 9 Mad. 334.

**Art. 57.** *For money payable for money lent; three years from the date when the loan is made.*

**Art. 58.** *Like suit when the lender has given a cheque for the money; three years from the date when the cheque is paid.*

**Art. 59.** *For money lent under an agreement that it shall be payable on demand; three years from the date when the loan is made.*

**Art. 60.** *For money deposited under an agreement that it shall be payable on demand; three years from the date when the demand is made.*

**Notes.**

Arts. 57 and 58 are the same as Arts. 56 and 57 of Act IX of 1871; Art. 59 corresponds to Art. 58 of that Act, but the time whence limitation runs has been altered from the date of demand to the date of the loan; Art. 60 is new.

The relation between a banker and customer is that of borrower and lender, not depositor and depositor; *Foley v. Hill*, 2 H. L. Ca. 28; *Nasir v. Dayabhai*, 10 Bomb. H. C. Rep. 300; *Hingun Lall v. Debee Pershad*, 24 W. R. 42; *Acharatlal v. Pranlal*, P. J. 1876, p. 53; *Keshavdas v. Gopal Govind*, P. J. 1883, p. 185; *Mahaluxmi v. Majanlal*, ib. p. 225; *Ichha Danji v. Natha*, I. L. R. 13 Bomb. 338; but see *Ishur Chunder v. Jibun Kumari*, I. L. R. 16 Calc. 25.

A deposited certain monies with B, a banker, and drew against them, but not to the full extent; the residue was employed on A's account by B, according to an agreement between them: Held that, besides the ordinary relation of banker and customer, there subsisted also the relation of principal and agent, and consequently the cause of action arose at the time of demand; *Nasir v. Dayabhai*, 10 Bomb. H. C. Rep. 300, following *Topham v. Bred-dick*, 1 Taunt. 572.

A suit to recover money lent with interest thereon, under a verbal agreement that the loan should be repaid with interest one year after the date of the loan, does not fall under Art. 57, but under Art. 115; *Rameshwar v. Ram Chund*, I. L. R. 10 Calc. 1033; followed in *Ramasami v. Muttusami*, I. L. R. 15 Mad. 380.

Art. 58 is the same as the English law, and the reason given for the law is, that if the loan was considered as made when the cheque was given, the lender might at once sue for it before the cheque was presented, and on presentation the cheque might be dishonoured; *Garden v. Bruce*, L. R. 3 C. P. 300.

Money payable at a certain time after demand does not become due until demand is actually made; *In re Rutherford*, 14 Ch. D. 687; and Art. 59, consequently, does not apply. See, also, *Sanjivi v. Errapa*, I. L. R. 6 Mad. 290, which was a case of money payable "at any time within six years upon demand." So, too, where a promise is made to pay money in consideration of some collateral thing to be done on demand, no cause of action arises until demand is made; *Ramchunder v. Juggut Monmohiney*, I. L. R. 4 Calc. at p. 294. Where a sum of money payable by a collateral debtor is made payable upon request, a request or

demand must be made before an action is brought, and limitation does not commence to run until request or demand is made; *Birks v. Trippet*, 1 *Wms. Saund*, 32; *Brown v. Brown* [1893], 2 *Ch.* 300. A lent money to a Building Society upon the terms that the sum should be repaid only after the lender had given notice to withdraw it, and that no money should be paid by the Society, except on production by the lender personally, or by some one with his written authority, of a loan pass book given to him when the loan was made; and it was held that until the condition as to the production of the pass book had been complied with, limitation did not begin to run against the lender; *Atkinson v. Bradford Building Society*, 25 *Q. B. D.* 377. See, also, *Dias v. Hongkong and Shanghai Banking Co.*, 1 *L. R.* 14 *Bomb.* 498.

Where accounts have been running for a number of years, and have been made up from time to time, between the plaintiff and defendants who were bankers and the defendants repaid all the principal and interest, except a portion of the latter, which was kept back in consequence of a dispute about the rate of interest to be allowed for the latter portion of the time; it was held that such balance could not be brought under the provisions of either Art. 59 or Art. 60; *Makundi v. Balkishen Das*, 1 *L. R.* 3 *All.* 328.

*Deposit.*—There is no satisfactory ruling as to what a deposit, within the meaning of Art. 60, is. In *Ram Sukh v. Brohmoyi Das*, 6 *C. L. R.* 470, it was held, that a deposit, as distinguished from a loan, refers to cases where money is lodged with another under an express trust, or under circumstances from which a trust may be inferred. This case was cited by *Norris, J.*, in *re Agabeg*, 12 *C. L. R.* 165. But this is too wide, because if there is an express trust, the deposittee could not use the money for his own purposes but must keep it separate, and a suit could be brought to recover or follow the money unfettered by any period of limitation. A payment of money with a request that it might be kept for the payee till he wanted it, amounts to a deposit; and so it was held in *Tidd v. Overell*, [1893] 3 *Ch.* 154; where the plaintiff deposited money with the defendant, saying, "Take care

of it till I want it," and it was decided that time did not begin to run until a demand had been made. Then, would a permission to the payee to use the money, or the payment of interest by the depositor, which would hardly take place if he were not permitted to use it, change it from a deposit to a loan? It would almost seem as if this article applied only to cases in which the money was to be returned to the depositor in specie, and no other *express* trust was impressed upon it.

The decision in 6 C. L. R. 470 has been dissented from in *Ishur Chunder v. Jibun Kumari*, I. L. R. 16 Calc. 25; in which it was held that where the plaintiff deposited with the firm of the defendant, who carried on a banking business, various sums of money, the amount deposited bearing interest, and at times certain sums were drawn out by the plaintiff, an account of the balance of principal and interest being struck at the end of the year and sent to the plaintiff; it was held that the cause of action arose under Art. 60, at the date of the demand for payment of the final balance, and that Art. 57 did not apply.

This Article (60) is not applicable to cases where the transaction is regarded by the law of the land as a loan; as in the ordinary banking transactions between a native *savkar* and his customers; *Ichha Dhanji v. Natha*, I. L. R. 13 Bomb. 338. That there was an understanding that the money paid in should not be drawn out till a favourable opportunity presented itself, that interest was agreed to be paid, that the plaintiffs should come annually to settle the account, and that it was understood that the money due would be drawn out in one sum, would not distinguish the case from the ordinary one of banker and customer; *ib.* The mere fact that a transaction is called a deposit does not prevent it being in law a loan; *Chandu v. Chunda*, Panj. Rec. No. 95 of 1885.

**Art. 61.** *For money payable to the plaintiff for money paid for the defendant; three years from the date when the money is paid.*

### Notes.

This article is the same as Art. 59 of Act IX of 1871.

This article covers the same class of claims as is included in the common *indebitatus* count for money paid by the plaintiff for the defendant *at his request*. A suit is maintainable in this form where there has been payment of money by the plaintiff to a third party at the request or by the authority of the defendant, express or implied, with an undertaking, express or implied, to repay it; *Brittain v. Lloyd*, 14 *M. and W.* 762; *Lewis v. Campbell*, 8 *C. B.* 541; *Hutchinson v. Sydney*, 10 *Exch.* 438. There must be actual payment, or its equivalent, by the plaintiff; *Power v. Butcher*, 10 *B. and C.* 329, 346; *Barclay v. Gooch*, 2 *Esp.* 171; executing a covenant to pay, or extinguishing a debt by giving a new security is not payment; *Power v. Butcher*, *ubi sup.*; *Taylor v. Higgins*, 3 *East*, 169; *Maxwell v. Jameson*, 2 *B. and Ald.* 51; see *Sunkur Pershad v. Goury Pershad*, 1, *L. R.* 5 *Calc.* 321. A request will be implied from the general course of dealing; *Sutton v. Tatham*, 10 *A. and E.* 27; *Smith v. Lindo*, 5 *C. B. N. S.* 587; where the defendant is aware of the payment and does not dissent; *Alexander v. Vane*, 1 *M. and W.* 511; where the payment is rendered necessary by the wrongful act of the defendant; *Bleaden v. Charles*, 7 *Bing.* 246; where the plaintiff has been legally compelled to pay a debt for which the defendant is liable; *Jefferys v. Gurr*, 2 *B. and Ad.* 833; *Bate v. Payne*, 13 *Q. B.* 900; *Pownall v. Ferrand*, 6 *B. and C.* 439. For further details of suits which may be brought under this article reference should be made to *Bullen and Leake's Precedents of Pleadings*.

On the 29th May 1873, one T drew from the hands of a shroff a sum of money which had been deposited by him in the name and to the credit of a third person. On the death of such third person, his heirs sued the shroff to recover the sum deposited, and on the 30th January 1878 obtained a decree, in satisfaction of which the shroff paid the decretal money into Court on the 15th January 1883. On the 5th February 1884 the shroff sued T, the heirs of the third party, and another person (who owned to having received some of the money from T), to recover the sum he had been compelled to pay under the decree of 1878. It was held that the cause of action arose, under this article, when

he actually paid down the money on the 15th January 1883; *Torab Ali v. Nilruttun*, I. L. R. 13 Calc. 155.

*Quære*, whether money can be said to have been paid for the defendant, when the defendant on the record is a mere name, such as the Secretary of State for India in Council; *Doya Narain v. Secretary of State*, I. L. R. 14 Calc. p. 275.

**Art. 62.** For money payable by the defendant to the plaintiff for money received by the defendant for the plaintiff's use three years from the date when the money is received.

### Notes.

This article is the same as Art. 60 of Act IX of 1871.

This form of suit is applicable wherever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which, in law, render the receipt of it a receipt by the defendant to the use of the plaintiff; *Per Lord Mansfield*, in *Morris v. Macfarlane*, 2 Burr. 1005, 1110; *Owen v. Challis*, 6 C. B. 115. The claim must be for money, or something which can be treated as money, as a cheque or bank-note; *Pratt v. Hobhouse*, 4 Bing. 173; *Pickard v. Bankes*, 13 East, 20; or money allowed in a settlement of account; *Standish v. Ross*, 3 Exch. 527; and must be for a sum certain; *Baxendale v. G. W. Railway Co.*, 14 C. B. N. S. 1. The money must belong to the plaintiff; *Scarp v. Hallifax*, 7 M. and W. 288; or must be received or held by the defendant as belonging to the plaintiff; *Kelly v. Curzon*, 4 A. and E. 622; *Clark v. Dignam*, 3 M. and W. 478. Money received by the Sheriff in execution of a writ of *fi. fa.* may be so recovered by the creditor issuing the writ; *Dale v. Birch*, 3 Camp. 347; or the proceeds of goods seized and sold; *Swain v. Morland*, 1 B. and B. 370; but not where the Sheriff has sold them under another writ at the suit of a third party; *Thurston v. Mills*, 16 East, 254. Where the plaintiff sued the defendant to recover money, recovered in execution, and wrongly paid to him under Sect. 295, C. P. C., the case will fall under this Article, and the plaintiff can sue within three years from the date when the money was received by



the defendant; *Vishnu v. Achut*, I. L. R. 15 Bomb. 438. The surplus sale proceeds of property sold for arrears of Government revenue remaining in the hands of the Collector, under the provisions of Act. XI of 1859, Sect. 31 are money had and received to the use of the proprietor of the estate; *Secretary of State v. Fazal Ali*, I. L. R. 18 Calc. 234 over ruled in *Secretary of State v. Gurus Prashad*, I. L. R. 20 Calc. 51 (F. B.).

Where the plaintiff's money has been wrongfully obtained by the defendant, plaintiff may waive the wrong, and claim it as money received to his use; *Hambly v. Trott*, 1 Cowp. 371, 376, *Neate v. Harding*, 6 Exch. 349; *Holt v. Ely*, 1 E. and B. 795; *Litt v. Martindale*, 18 C. B. 314; or where the defendant has received fees appertaining to an office, asserting his right thereto, whereas the plaintiff was entitled to them; *Spy v. Emperor*, 6 M. and W. 639; *Pinder v. Barr*, 4 E. and B. 105.

Where the plaintiff's goods have been wrongfully obtained by the defendant and converted into money, the plaintiff may waive the wrong, and follow the proceeds in this form of suit; *Lamine v. Dorrell*, 2 Ld. Rayn. 1216; *Oughton v. Seppings*, 1 B. and Ad. 241.

Money paid by the plaintiff for a consideration which has entirely failed may be thus recovered; *Westropp v. Solomon*, 1 D. and L. 122; *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Ex. 783; *Hanuman v. Hanuman*, I. L. R. 15 Calc. 51; and if the consideration is severable, complete failure of part may form a ground for recovering a proportionate part of the money paid for it; *Devaux v. Conolly*, 8 C. B. 640. It is only on the failure of the consideration that money so paid is received to the use of the plaintiff; *Atul Kristo v. Lyon*, I. L. R. 14 Calc. 457. Where goods have been paid for in advance, and are subsequently short-delivered, the failure of consideration takes place at the time of delivery, and limitation will run from the date; *ib.* In a similar case the Panjab Chief Court held that the case fell under Art. 115; *Edulji v. Arjun Das*, Panj. Rec. No. 22 of 1883. There would seem, however, to be no difference in the practical result, as the failure of consideration, and the breach of contract would both

take place on the short delivery, which would be on the date of last actual delivery, or if that was anterior to the date when the contract was to be completely fulfilled, then on this date. In the case of money paid for the purchase of property to which the vendor has no title, the consideration fails from the date on which the money is paid, and not from the date when the absence of title was first discovered; *Hanuman v. Hanuman*, 1. L. R. 15 *Calc.* 51; *S. C.* on appeal 18 *I. A.* 158; *I. L. R.* 19 *Calc.* 123.

Money paid by plaintiff to get rid of duress to the person or even the goods of the plaintiff may be recovered in this form of suit; *Aslley v. Reynolds*, 2 *Str.* 915; *Skeate v. Beal*, 11 *A. and E.* 913; *Atlee v. Backhouse*, 3 *M. and W.* 633; also money exacted by other kinds of extortion or oppression; *Smith v. Cuff*, 6 *M. and S.* 160; *Smith v. Sleaf*, 12 *M. and W.* 585, *Duke de Cadaval v. Collins*, 4 *A. and E.* 858. But money paid under the compulsion of legal process cannot be recovered under this form so long as the process remains in force; *De Medina v. Grove*, 10 *Q. B.* 152; *Pit. v. Coomes*, 4 *A. and E.* 459.

A suit in this form will also lie for money paid by the plaintiff in discharge of a demand illegally made under colour of an office; *Morgan v. Palmer*, 2 *B. and C.* 729; *Steele v. Williams*, 8 *Ex.* 625; and to recover money paid by reason of ignorance or mistake of fact, or by reason of an excusable forgetfulness of fact; *Bize v. Dickason*, 1 *T. R.* 285; *Kelly v. Solary*, 9 *M. and W.* 54; *Aiken v. Short*, 1 *H. and N.* 210; but not for money paid in ignorance or mistake of law; *Bilbie v. Lumley*, 2 *East*, 469. It will also lie to recover money paid on account of an illegal executory contract, or for an illegal object, if brought before the contract is executed or the object accomplished; *Jaques v. Withy*, 1 *H. Bl.* 65; *Bone v. Ekless*, 5 *H. and N.* 925; *Ganga v. Baldeva*, *Panj. Rec.* No. 194 of 1882. For a large number of other cases in which this form of suit has been held to be maintainable reference should be made to *Bullen and Leake's* *Precedents of Pleading*.

When a certificate under Act XXVII of 1860 is cancelled and a fresh one granted; the holder of the latter may recover from

the holder of the former certificate money received by him as money received to the use of the plaintiff; *Gangia v. Rangi Singh*, *I. L. R. 9 All.* 173.

Under this Act some of the causes of action which in England fall under money received to the use of the plaintiff, will fall under other articles, and suits should be brought under those articles, because under this article limitation runs from the time the money is *received* by the defendant, and the cause of action, *e. g.*, failure of consideration, which is the fact which makes the money in the hands of the defendant to be money received to the use of the plaintiff, may not arise till the claim is barred under this section. So, too, in the case of money paid under a mistake, Art. 96 should be relied on, as under that article limitation runs from the date of the discovery of the mistake. The defendant in a suit was in possession of certain land, under a *mokurari* lease granted by A, a Hindu widow, without legal necessity. A portion of the land was taken by Government for public purposes and the compensation was paid into the Collectorate. The plaintiffs, the heirs of A's husband, filed a suit to set aside the lease in which they succeeded. While this suit was pending, the lessee drew out the compensation money, and the plaintiffs after the decision of their suit filed another against him to recover the money he had so drawn. It was held that the claim did not fall under this article, but under Art. 120, because "it cannot be said that the money was taken out by the defendant for the plaintiff's use"; *Nundo Lall v. Meer Aboo*, *I. L. R. 5 Calc.* 597 at p. 601. If the Judges who decided this case meant to rule that money is not received to the plaintiff's use in any case where, at the time of receipt, the defendant does not so intend to receive it, the decision is wrong, as many of the English cases cited before shew, *e. g.*, a man who wrongfully takes money belonging to the plaintiff, or wrongfully converts his goods and the plaintiff sues for the proceeds. But it may be that the article is confined to those cases in which the defendant, *at the time of receipt*, in fact, or by presumption, or fiction of law, receives the money to the use of the plaintiff, and excludes those cases in which the receipt becomes one to the use of the plaintiff by virtue of some sub-

sequent event. That this was probably the intention of the Legislature may perhaps be gathered from the insertion of Arts. 87, 96 and 97. A similar case to the one just cited is that of *Kulichurn Dutt v. Jogesh Chunder*, 2 C. L. R. 354, wherein it was held that money paid in satisfaction of decrees obtained in virtue of, and dependent on, a prior decree which was subsequently reversed, is not money received to the use of the plaintiff but that Art. 120 applied. See, also, *Narayana v. Narayana*, I. L. R. 13 Mad. 437; *Krishnan v. Perachan*, I. L. R. 15 Mad. 382. In Allahabad the rulings have been to a different effect. A decree held by the plaintiff was sold in execution of a decree against him; subsequently the sale was set aside. It was held that the plaintiff could sue the purchaser for monies received by him under the decree he had bought, as money received to the use of the plaintiff; *Bhawani Kuar v. Rikhi Ram*, I. L. R. 2 All. 354. Assuming that this case was rightly decided, it is very doubtful whether the decision of the majority of the Full Bench in the case of *Ram Kishen v. Phawani Das*, I. L. R. 1 All. 333, therein cited, is correct, as the money in that case was paid under an order of a Court which was still in existence at the time of the suit.

Where a Collector employed certain *karkuns* to assist a *deshmukh* in the performance of his duties, deducting the amount of their pay from the *deshmukhi vatan*, but failed to shew that their employment was necessary, it was held that the *deshmukh* was entitled to recover the money so deducted as money received for his use; *Rungoba v. Collector of Ratnagiri*, 8 Bombay H. C. Rep. A. C. J. 107.

Where the defendant agreed to purchase a house *benames* for the plaintiff, and convey it to him, on the latter paying for it by certain instalments, and the plaintiff paid more than he had agreed, the excess was held to be money received to the use of the plaintiff which must be sued for within three years from the date of payment; *Radha Nath v. Bama Churn*, 25 W. R. 415. Where the defendant, a *batwara ameen*, employed by the Collector drew a sum of money to pay the establishment, but did not pay

the plaintiff, a *mohurir* serving under him, it was held that the plaintiff had three years in which to sue; *Abhaya Churan v. Haro Chandra*, 4 Ben. L. R. App. 68. Where the defendant, one of several co-sharers, received a sum of money on account of a debt, which he retained, and all the co-sharers subsequently brought separate suits against the debtor for their respective shares, the result of which was that the defendant eventually got Rs. 16,000 more than he was entitled to, and the plaintiff Rs. 25,000 less; it was held that the excess received by the defendant was money received to the use of the plaintiff, and that limitation began to run from the time when the defendant received money in excess of his share; *Syed Loolf v. Afzulnissa*, 16 W. R. P. C. 20.

An *inamdar* was declared to be entitled to the money value of certain fixed quantities of grain from the *khot* defendant. In a subsequent suit to recover such values, it was held that the *inamdar* under this Article was only entitled to recover arrears for three years; *Morbhat v. Gangadhar*, I. L. R. 8 Bomb. 234.

Where the plaintiff claimed, as one of the heirs of N, a moiety of a sum of money which had been deposited by N with a banker, the whole of which had been received by the defendant, his co-heir; it was held that this was money received to the use of the plaintiff; *Kundun Lal v. Bansī Dhar*, I. L. R. 3 All. 170; so, too, where the plaintiff sued his guardian for certain specific sums received by him during the plaintiff's minority out of property belonging to the plaintiff; *Surjan v. Churan*, Panj. Rec. No. 56 of 1883. Where, on the separation, of a joint family certain bonds in the name of the defendant continued to be held jointly and the defendant received the amount of one, but did not pay one-half over to the plaintiff; it was held that the plaintiff's claim was for money received to his use and that the suit must be brought within three years from the date of the defendant's receipt of the money; *Thakur Prasad v. Purtab*, I. L. R. 6 All. 442; see, also, *Weber Ali. v. Guddai Behari*, 2 C. L. R. 165; *Tellis v. Saldanha*, I. L. R. 10 Mad. 69. Where a sharer in a *watan* has improperly received the plaintiff's share of the *huk*, the

plaintiff must bring his suit within three years under this article; *Harmukhgauri v. Harisukh Prasad*, I. L. R. 7 Bomb. 191, doubting *Chhaganlal v. Bapubhai*, I. L. R. 5 Bomb. 68; and followed in *Desai Maneklal v. Desai Shivalal*, I. L. R. 8 Bomb. 426; but *Chhaganlal v. Bapubhai* has been approved of in *Keshav v. Narayan*, I. L. R. 14 Bomb. p. 241. So, too, where a person having obtained a decree declaratory of his title, sues his co-sharer in a *deshpande vatan*, who is bound by the decree, to recover arrears, his suit falls under this article; *Dulab Vahuji v. Bansidhari*, I. L. R. 9 Bomb. 111; see, also, *Ravji v. Bala*, I. L. R. 15 Bomb. 135. So, also, where a sharer in a *vatan* has under the orders of the Collector, afterwards reversed, paid too large a sum to the actual office-holder for his emolument; *Ladji Naik v. Musabi*, I. L. R. 10 Bomb. 665.

A suit to recover money of the plaintiff obtained by the fraud of the defendant in collusion with a third party comes under this article; *Raghamoni v. Nilmoni Singh*, I. L. R. 2 Calc. 393.

Money deposited as part security for the due performance of the terms of a lease in case it should be granted, may be recovered as money received to the use of the plaintiff, when the negotiations for the lease fall through; *Johuri Mahton v. Thakoor Nath*, I. L. R. 5 Calc. 830. Money paid to the defendant by the plaintiff on the condition that he should not execute a decree against the plaintiff may be recovered as money received to the use of the plaintiff on the decree being executed; *Lingapa Hegde v. Vykunth Naik*, P. J. 1883, p. 56. These two cases would also fall under Art. 97, and that Article should be relied on in similar cases if the suit is barred under the present one.

An equitable claim to follow the proceeds of timber in the hands of the defendant who had sold it by orders of his principal, a wrong-doer, and to make him responsible for the amount does not come under this article, but under Art. 120; *Guru Das v. Ram Narain*, 11 I. A. 59; S. C., I. L. R. 10 Calc. 860; nor does a suit to take accounts of money received by a trustee and to recover what may be in his hands, which would also fall under Art. 120; *Muhammad Hubibullah v. Safdar Husein*, I. L. R. 7 All. 25.

**Art. 63.** *For money payable for interest upon money due from the defendant to the plaintiff; three years from the date when the interest becomes due.*

### Notes.

This Article is the same as Art. 61 of Act IX of 1871.

It is difficult to understand to what claims this article is applicable. Reading it literally it would enable a plaintiff who had lent money to the defendant, repayable on demand, the interest whereon was to be paid at the end of each year from the date of the loan, to sue for three years' interest up to any time within four years from the date of the loan, although a suit for the principal would be barred. It would also compel a plaintiff who had lent money otherwise than on mortgage, repayable in six years, to sue every three years for his interest. As to interest on mortgages, see the notes to Art. 132.

A suit for the balance of interest, where the principal and a part of the interest has been paid up, and there is a dispute as to the rate at which interest is to be calculated, would come under this article; *Makundi Kuar v. Balkishen Das*, I. L. R. 3 All. 328.

This article applies to *suits to recover interest* brought by the person to whom the interest is payable, and does not affect the right of that person to obtain more than three years' interest in any way which does not require him to bring a suit; see *Edmunds v. Waugh*, L. R. 1 Eq. 418; *Marshfield v. Hutchings*, 34 Ch. D. 721. *Quære*, whether this decision would apply to a defendant pleading more than three years' interest prior to the date of the filing the suit as a set-off, seeing that set-off must be of a claim which is "legally recoverable," and a claim of set-off is to be treated as a plaint in a cross suit.

**Art. 64.** *For money payable to the plaintiff for money found to be due from the defendant to the plaintiff on accounts stated between them; three years from the date when the accounts are stated in writing signed by the defendant or his agent duly authorized in this behalf, unless where the debt is, by a simultaneous agreement in writing signed as aforesaid, made payable at a future time, and then when that time arrives.*

## Notes.

This Article corresponds to Art. 62 of Act IX of 1871, but the provisions requiring the accounts to be stated, and the simultaneous agreement to be, in writing and signed are new.

Accounts stated in England are of two kinds; the first is in fact only the adjustment and acknowledgment of the amount due in respect of a debt, and if that debt has not accrued within the prescribed period of limitation before the suit, the adjustment or statement of account must be in writing; the other is where there are debts on both sides, and it is agreed that the cross-demands shall be set-off and a balance stated, and then it is no objection to such an account that some of the earlier items are barred, because the agreement to set-off operates as a payment of the items to which it applies; *Ashby v. James*, 11 *M. and W.* 542; *Clark v. Alexander*, 8 *Scott N. R.* 147, *Laycock v. Pickles*, 33 *L. J. N. S. Q. B.* 43. The Courts in India have held that under Act. XIV of 1859, the same principles applied; *Mulchand Gulabchand v. Girdar Madhav*, 8 *Bomb. H. C. Rep. A. C. J.* 6; *Hargopal Prem-sukdass v. Abdul Khan*, 9 *Bomb. H. C. Rep.* 429; and the cases referred to therein. Under the present article the statement of accounts must be in writing and must be signed; *Thakurya v. Sheo Singh*, *I. L. R.* 2 *All.* 872; *Zulfikar Hussein v. Munna Lall*, *I. L. R.* 3 *All.* 148 (*F. B.*); *Dukhi Sahu v. Mahomed Bikhu*, *I. L. R.* 10 *Calc.* 284 (*F. B.*), overruling *Sheikh Akbar v. Sheikh Khan*, *I. L. R.* 7 *Calc.* 256; See, also, *Amuthu v. Muthayya*, *I. L. R.* 16 *Mad.* 339. Further an account stated to come under this article must be one which falls under the second class before referred to, and which would under the older English law have constituted an *insimul computaverunt*; *Nahanibai v. Nathu Bhau*, *I. L. R.* 7 *Bomb.* 414. *Nana Ram v. Ram Prasad*, *I. L. R.* 2 *All.* 641, seems to have been a case of this kind. A mere balance struck and signed does not come under this article; *Nahanibai v. Nathu Bhau*, *ubi sup.*; nor a signed account containing one item on one side only; *Trilhowan Gangaram v. Amina*, *I. L. R.* 9 *Bomb.* 516; followed in *Jamun v. Nand Lal*, *I. L. R.* 15 *All.* 1. In *Ramji v. Dharma*, *I. L. R.* 6 *Bomb.* 683, the Court added a further



requirement, viz., that the signature of the debtor should contain a distinct promise to pay the balance, but that is not required by this Article, and the Court so ruled upon the provisions of Sect. 25 of Act IX of 1872, apparently not calling to mind the details of a true account stated and the consideration involved therein; and relying upon the cases of *Amritlal v. Manecklal*, 10 *Bomb. H. C. Rep.* 375, and *Hanmantlal v. Ramabai*, *I. L. R.* 3 *Bomb.* 198, which, however were decided under Sect. 21 of Act IX of 1871; which does not apply to an account stated, but which does provide for an *agreement* in writing. If there is no account stated in writing and signed, the plaintiff must sue for money lent and then he will be able only to recover such items as are not barred; see the cases above quoted in *I. L. R.* 2 *All.* and 10 *Calc.*

It should be noted that the *account stated must be in writing as well as signed*, consequently no mere acknowledgment in writing of a sum due will bring a case under this Article, and this provision prevents it clashing with Sect. 19. Any document which is a mere acknowledgment must be dealt with under that section. These distinctions make the law different to what it is in England, where an I. O. U. or a bill of exchange given by the defendant was held to be evidence of an account stated; *Jacobs v. Fisher*, 1 *C. B.* 178; *Curtis v. Rickards*, 1 *M. and G.* 46; *Wheatly v. Williams*, 1 *M. and W.* 533. These special provisions of this Article were apparently overlooked in *Bhikhan v. Rajroop Kooer*, *I. L. R.* 8 *Calc.* 912; where *Mitter* and *Maclean*, JJ., held that a *kistbundi* agreeing to pay a decree by instalments was evidence of an account stated. In this case, however, the Court was hampered by the fact that the *kistbundi* also related to land, and was not registered, and that the parties were bound by an unappealed order of the Court below on a question of execution.

If there be a real statement (and not merely an adjustment) of accounts, and an oral agreement to pay the balance found to be due with interest, the plaintiff would be entitled to bring a suit for the recovery of the amount agreed to be paid within three years of the breach of contract, under Art. 115; *Baldeo Singh v. Sheodan*, *Panji. Rec.* No. 20 of 1883.

Any agreement to extend the time of payment must be in writing and signed; *Dagdusa v. Shamad*, I. L. R. 8 Bomb. 542.

As to what constitutes a signature, see the notes to Sect. 19.

**Art. 65.** *For compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency; three years from the date when the time specified arrives or the contingency happens.*

### Notes.

This corresponds to Art. 63 of Act IX of 1871, but the present article has the words "for compensation for breach of a promise" instead of "upon a promise."

Where the plaintiff received an indemnity bond from the defendant agreeing to indemnify him against the misconduct of a third person, who subsequently committed embezzlement, it was held that the case fell under this Article or Art. 83, and not under Art. 95; *Shapurji Jehangirji v. Superintendent of Poona Jail*, 12 Bomb. H. C. Rep. 238. An agreement by a vendor of land that if there is any deficiency in the quantity of the parcel sold he will make compensation, falls under this Article, unless the agreement be registered and then under Art. 116; *Kishen Lal v. Kinloch*, I. L. R. 3 All. 712.

Where the promisor before the arrival of the specified time intimates his intention of not performing his promise, limitation under this article will still not commence to run until the specified time arrives; *Mansuk Das v. Rangayya Chetty*, 1 Mad. H. C. Rep. 162, and the cases cited therein.

A verbally became security for the payment of money borrowed by B on a bond conditioned for the payment in May 1872 of money borrowed from the plaintiff, promising "if B does not pay eventually (*shesh projunto*) I will." Default was made, and in April 1878, the plaintiff filed a suit against A and B which was clearly barred as to the latter. It was held that the words *shesh projunto* could not be limited to the time mentioned in the bond, and that evidence should be taken as to the time when demand was made upon B for payment, and then the provisions of this article should be applied; *Bishumber Dey v. Hungsheshur*, 4 C. L. R. 34.

**Art. 66.** *On a single bond where a day is specified for payment; three years from the day so specified.*

**Art. 67.** *On a single bond where no such day is specified; three years from the date of executing the bond.*

**Art. 68.** *On a bond subject to a condition; three years from the time when the condition is broken.*

### Notes.

These three articles are the same as Arts. 65, 66 and 67 of Act IX of 1871.

The definition of the word "bond" in Sect. 3 is not an exhaustive one, the word "includes" has an extending force, and does not limit the meaning of the term to the definition; *In re Nasibun*, I. L. R. 8 Calc. 584. A single bond is a bill or written engagement for the payment of money without alternative conditions or a penalty attached; *Luchman Singh v. Kesri* I. L. R. 4 All. 3; *Gurditta v. Pal Singh*, Panj. Rec. No. 26 of 1892.

Where a bond provides that a sum shall be paid within a certain specified time, the last day of that period is the day specified for payment under Art. 66; *per Spankie, J.*, in *Ball v. Stowell*, I. L. R. 2 All. 331; *Narain Babu v. Gouri Pershad*, I. L. R. 5 Calc. 21; *secus Gauri Shankar v. Surji*, I. L. R. 3 All. 276.

Any of the bonds referred to in these Articles would fall under Art. 116, if registered; *Nobocoomar v. Siru Mullick*, I. L. R. 6 Calc. 94; *Ganesh Krishn v. Madhavray Ravji*, I. L. R. 6 Bomb. 75; *Kalut Ram v. Lala Dharmukadhari*, 11 C. L. R. 361.

**Art. 69.** *On a bill of exchange or promissory note payable at a fixed time after date; three years from the date when the bill or note falls due.*

**Art. 70.** *On a bill of exchange payable at sight, or after sight, but not at a fixed time; three years from the date when the bill is presented.*

**Art. 71.** *On a bill of exchange accepted payable at a particular place; three years from the date when the bill is presented at that place.*

**Art. 72.** *On a bill of exchange or promissory note payable at a fixed time after sight or after demand; three years from the date when the fixed time expires.*

**Art. 73.** *On a bill of exchange or promissory note payable on demand and not accompanied by any writing restraining or postponing the right to sue; three years from the date of the bill or note.*

### Notes.

These articles correspond to Arts. 68 to 72 of Act IX of 1871. In Art. 70 the words "but not at a fixed time" have been added to distinguish clearly between the cases falling under this Art, and those falling under Art. 72, the former relating to bills drawn simply "at sight," and the latter to those drawn payable so many days or months "after sight." In Art. 73, the date when limitation commences has been altered from the date of demand to the date of the bill; this change renders it unnecessary to cite several of the cases decided under the former Act.

Art. 72, in respect to the limitation on a bill payable at a certain time after demand, follows *Thorpe v. Coombe*, 8 D. and R. 347.

A promissory note payable after six months, whenever the plaintiff shall demand the same, is a promissory note payable on demand with the right to sue restrained for six months, and limitation consequently begins to run at the expiration of six months from its date; *Jeaunissa v. Manikji Kharsetji*, 7 Bomb. H. C. Rep. 36. A promissory note payable at any time within six years on demand does not fall under Art. 73, but under Art. 120; *Sanjivi Reddi v. Kama Errapa*, I. L. R. 6 Mad. 290.

Where the holder of a note payable on demand made a demand for the money on the maker who paid him interest in advance up to a certain date, upon the condition that no further demand should be made until that date; it was held that this amounted to a new contract, and that limitation ran from the date up to which the interest had been paid; *Natha Hira v. Janardhan Ramchandra*, I. L. R. 1 Bomb. 503.

Where demand was made while Act IX of 1871 was in force, and a suit filed within three years from such demand, but in the

meantime this Act had come into force, and under it the suit was barred, it was held that this Act applied; *Bhansi Dhar v. Harsahai*, I. L. R. 3 All. 340.

**Art. 74.** *On a promissory note or bond payable by instalments; three years from the expiration of the first term of payment, as to the part then payable; and for the other parts, the expiration of the respective terms of payment.*

**Art. 75.** *On a promissory note or bond payable by instalments; which provides that, if default be made in payment of one instalment, the whole shall be due; three years from the time when the first default is made unless where the payee or obligee waives the benefit of the provision, and then when fresh default is made in respect of which there is no such waiver.*

### Notes.

In Art. 75, the words "in respect of which there is no such waiver" have been added.

Art. 75 is applicable only to *suits* on bonds and promissory notes payable by instalments, not to *applications* on decrees payable by instalments; *Ugrah Nath v. Laganmani*, I. L. R. 4 All. 83; but the principles which govern the application of these articles to suits will also be applicable to decrees payable by instalments, and *vice versa*; nor is this article applicable to a suit brought on a verbal contract; *Koylash Ohunder v. Boykoonto Nath*, I. L. R. 3 Cal. 619; *S. C. 2 C. L. R. 167*.

*Payable by instalments.*—Where, by a bond, the principal lent was payable within a fixed time, but the interest was made payable half-yearly, and premia on certain policies of insurance were payable as they fell due; it was held that this was not a bond payable by instalments; *Bull v. Stowell*, I. L. R. 2 All. 322; *Narain Babu v. Gouri Pershad*, I. L. R. 5 Cal. 21. Where a bond provided that the obligee should be put in possession of land, and out of the produce thereof pay himself certain sums annually, and the balance to the obligor, and that if the obligee's receipts of produce should in any way be interfered with, the obligor should pay certain sums annually; it was held that this was a bond payable by instalments; *Ramchandra Baji v. Gokalgiri*

*Guru*, P. J. 1877, p. 309. Where in a bond payable by instalments it was provided that the first instalment should be payable at a certain date on production of a receipt from a third person; it was held that this proviso prevented any money being claimable until the creditor was satisfied; *Lakhmichand Umedmal v. Beale*, P. J. 1875, p. 9.

Where money lent was made payable at a certain date, subject to the payment of interest quarterly, but it was provided that if any quarterly payment of interest should remain unpaid 21 days after the same should become payable, it should be lawful for the plaintiff immediately upon the expiry of such 21 days to call in and demand payment of the principal sum, and all interest then due, it was held that the cause of action accrued on the expiry of 21 days from the time when the first unpaid instalment of interest became due; *Reeves v. Butcher* [1891], 2 Q. B. 509; following *Hemp v. Garland*, 4 Q. B. 519.

*Election to recover whole amount.*—Where there is only a mer right or option to the creditor to elect to recover the whole amount at once on failure in the payment of an instalment, that does not make the whole amount become payable at once, merely on failure in the payment of an instalment, but the creditor must exercise his power of election; *Nilmadhub v. Ramsodoy*, I. L. R. 9 Calc. 857; *Asmutullah v. Kally Churn*, I. L. R. 7 Calc. 56; *secus*, *Khairuddin v. Atu Mal*, Panj. Rec. No. 188 of 1883 (F. B.) Nor does the whole amount become payable at once by the failure of the payment of one instalment where it is provided that the whole shall become due on failure of an instalment on demand being made for such sum; *Hanmatram Sadharam v. Bowles*, I. L. R. 8 Bomb. 561. See, also, *Prem Singh v. Mula Mal*, Panj. Rec. No. 10 of 1883.

*Waiver.*—What is waiver? Delay is not waiver. Inaction is not waiver, though it may be evidence of waiver. Waiver is a consent to dispense with something to which a person is entitled; *Selwyn v. Garfit*, 38 Ch. D. at p. 284; a foregoing of a right so that it cannot be enforced; *Hiralal Bachanji v. Budho Bahiru*, P. J. 1883, p. 172; which involves a knowledge or notice of such

right; *Nagardas v. Ganu*, P. J. 1891, p. 107; in fact an agreement to supersede or suspend the right of suing; *Gumna v. Bikhtu Hariba*, I. L. R. 1 Bomb. 123 (F. B.). A mere omission to sue upon the falling due of an instalment is not a waiver of the condition that the whole amount shall become due at once; *Cheni Bash v. Kadum Umedul*, I. L. R. 5 Calc. 97; *Sheikh Husein v. Sheikh Madar*, P. J. 1884, p. 323; *Gopal Tulsiram v. Shivram Mahuji*, P. J. 1883, p. 175; *Sethu v. Nayana*, I. L. R. 7 Mad. 577; *Gopala v. Paramma*, ib. 583; *Nobodip v. Ram Krishna*, I. L. R. 14 Calc. 397; *Khairuddin v. Atu Mal*, Panj. Rec. No. 188 of 1883 (F. B.). The mere payment and receipt of an overdue instalment is not a waiver of the creditor's right to sue; *Mumford v. Peal*, I. L. R. 2 All. 857; *Gumna v. Bikhtu Hariba*, *ubi sup.*, overruling *Ramkrishna v. Bayagi*, 5 Bomb. H. C. Rep. A. C. J. 35; *Hiralal Bachanji v. Budho Bahiru*, *ubi sup.*; *Ram Culpo v. Ram Chunder*, I. L. R. 14 Calc. 352; *secus*, *Dharamdas v. Niamat*, Panj. Rec. No. 78 of 1890. The receipt of sums which do not appear to have any reference to any particular over due instalment does not amount to a waiver; *Khairuddin v. Atu Mal*, *ubi supra*. In Calcutta, however, it has been held that the receipt of an instalment as such after the due date, instead of insisting on payment in full, amounts to a waiver of the condition; *Cheni Bash v. Kadum Umedul*, *ubi sup.*; and so it was held in *Papamma Row v. Toleti Venkaiya*, 5 Mad. H. C. Rep. 198. In *Satracherla v. Setarama*, I. L. R. 3 Mad. 61; it was, however, held that where a payment was accepted after default it was a question of fact to be determined by evidence whether the creditor intended thereby to waive the benefit of the particular condition, or merely to grant the debtor time for the payment of the balance; and if the payment on account is accepted on account of the specific instalment in arrear, as distinguished from a part payment on account of the whole debt, there may be sufficient evidence of a waiver; *Nagappa v. Ismail*, I. L. R. 12 Mad. 192. Where a plaintiff, in default of payment of a certain sum by the defendant is entitled to receive a much larger sum, and, subsequently to default being made, receives from the defendant a larger sum than that which was due at the prescribed time, but one smaller than

that which he was entitled to on default under the agreement, he cannot be said to have waived his right to recover, the larger sum; *Nanjappa v. Nanjappa*, I. L. R. 12 Mad. 161; see also *Balaji v. Sakharam*, I. L. R. 17 Bomb. 555. Where default was made in payment of one instalment in 1883, but the judgment-creditor subsequently received that instalment and continued to receive the instalments which afterwards fell due from time to time, although in 1884 he had made an application for execution of the whole decree, which, however, was not proceeded with, it was held that he had waived the default and could not again apply for execution of the whole decree; *Buddhu Lal v. Rekkhal Das*, I. L. R. 11 All. 482.

A condition that, on default of payment of an instalment, interest should be paid on it, only amounts to a proviso that the obligee may exercise a right of waiver, and in order to bring the case within the latter part of the Article, proof must be given that he has actually exercised the right; *Navalmal v. Dhondiba*, 11 Bomb. H. C. Rep. 155.

A creditor cannot be compelled to waive the right he has acquired on the debtor's default; *Ragho Govind v. Dipchand*, I. L. R. 4 Bomb. 97.

A waiver before Act IX of 1871 came into force cannot affect limitation; *Ahmad Ali v. Hafiza*, I. L. R. 3 All. 514.

**Art. 76.** *On a promissory note given by the maker to a third person to be delivered to the payee after a certain event should happen; three years from the date of the delivery to the payee.*

### Notes.

This is a Legislative enactment of the principle of *Savage v. Aldren*, 2 Stark 232; where a promissory note was given to bankers, to be delivered to the payee upon his producing and cancelling another note, it was held that time did not run till the note was delivered by the bankers to the payee.

**Art. 77.** *On a dishonoured foreign bill where protest has been made and notice given; three years from the date when the notice is given.*



**Note.**

This Article is the same as Art. 77 of Act IX of 1871. It applies only to cases of dishonoured foreign bills which have been protested, and of the dishonour of which notice has been given by the holder to the persons whom he desires to make liable thereon. The cases in which notice is necessary are provided for in Sect. 93 of the Negotiable Instruments Act, 1881. Cases of dishonoured bills of exchange in which notice is not necessary to enable the holder to sue, and in which notice has not been given, will fall under Arts. 78 and 80.

**Art. 78.** *By the payee against the drawer of a bill of exchange which has been dishonoured by non-acceptance; three years from the date of the refusal to accept.*

**Note.**

This article is the same as Art. 78 of Act IX of 1871. In that Act there was another article, Art. 79, which provided for the case of a bill having been refused acceptance, and afterwards refused payment; but the period of limitation began to run from the same date, viz., the date of refusal of acceptance. This last named article does not appear in the present Act.

**Art. 79.** *By the acceptor of an accommodation-bill against the drawer; three years from the date when the acceptor pays the amount of the bill.*

**Note.**

This article corresponds to Art. 81 of Act IX of 1879.

**Art. 80.** *Suit on a bill of exchange, promissory note or bond not herein expressly provided for; three years from the date when the bill, note or bond becomes payable.*

**Notes.**

This corresponds with Art. 80 of Act IX of 1871, but this Article includes bonds, which the former one did not.

In *Ball v. Stowell*, I. L. R. 2 All. 322, at p. 331, *Spankie*, J., held that a bond covenanting to pay the principal money within

three years, the principal half-yearly, and the premia on certain life policies as they fell due, and containing a provision that if any of these payments was not made, the obligee might, if he so desired, sue at once for the whole amount due on the bond, came under this article.

A suit on an unregistered bond hypothecating movable property left in the possession of the obligor to recover the amount owing out of the property must be brought within three years from the date when the amount secured by the bond becomes due; *Vitla Kamti v. Kalekara*, I. L. R. 11 Mad. 153.

**Art. 81.** *By a surety against the principal debtor; three years from the time when the surety pays the creditor.*

**Art. 82.** *By a surety against a co-surety; three years from the time when the surety pays anything in excess of his own share.*

**Art. 83.** *Upon any other contract to indemnify; three years from the time when the plaintiff is actually damaged.*

### Notes.

These Articles are the same as Arts. 82 to 84 of Act IX of 1871.

Comparing Arts. 81 and 83, it would seem that Art. 81 is confined to cases of loans of money, or, where one person is liable for a definite sum which at the time constitutes, or which will at some future time constitute, a debt, and to suits by the surety against his principal, where he has himself paid the creditor; *Madar v. Ahmed*, Panj. Rec. No. 98 of 1881; *quære*, whether it would include a case where the security was given for the due performance of a contract, or of an office where the promisee could only claim damages as distinguished from a debt, and the surety had been compelled to pay such damages.

Such a case would, however, in all probability, come under Art. 83, there being an implied contract by the principal to indemnify his surety against any payment he may have to make, and the word "contract" would probably be held to include both express and implied contracts. If, however, such a case does not fall under Art. 83, it would fall under Art. 115, which would make a great difference in the time from which limitation would begin

to run. Under Art. 83, it would begin to run from the time when the plaintiff is damnified, i. e., when the surety had to pay the damages caused by the principal's default; under Art. 115, time would run from the breach by the principal of the contract to repay to the surety what he had had to pay, and that could hardly be said to have happened until demand had been made on the principal and he had neglected or refused to pay. Art. 83 covers all cases in which the person indemnified sues the sureties under their contract as such, but it is curious that the Legislature should not have provided an article *so nomine* for this class of cases, which is the most usual form in which questions connected with indemnities crop up. Such cases would also come under Art. 65; *Shapurji Jahangirji v. Superintendent of Poona Jail*, 12 *Bomb. H. C. Rep.* 238.

In the case of a surety paying the claim against him by instalments, under Art. 81, limitation would begin to run against him in respect of each instalment from the date on which it was paid; but under Art. 82, limitation would only begin to run when the instalment was paid which caused the total amount paid by the surety to be in excess of his share, and then, only for so much as was by that instalment paid in excess; *Davies v. Humphries*, 6 *M. and W.* 153.

Where the plaintiff received a bond of indemnity from the defendant against the misconduct of a third person who was to be employed under the plaintiff, and such person subsequently committed embezzlement; it was held that the plaintiff was damnified at the time the act of embezzlement took place; *Shapurji Jahangirji v. Superintendent of Poona Jail*, *ubi sup.* A person who is liable to another on an indemnity with the right of indemnity in his favour against a third party is not damnified until a decree has passed against him for the amount claimed from him, or he has paid that amount without suit; *Pepin v. Chunder Seekur*, 1 *L. R.* 5 *Calc.* 811. See, also, *Collinge v. Heywood*, 9 *A. and E.* 633; *Davies v. Humphries*, 6 *M. and W.* 153; *Reynolds v. Doyle*, 2 *Scott, N. R.* 45; *Angrove v. Tippet*, 11 *L. T. N. S.* 708. The *Statute of limitations* does not begin to run against

a surety suing a co-surety for contribution until the liability of the surety is ascertained, *i. e.*, until the claim of the principal creditor has been established against him, although at the time of the action for contribution the statute may have run as between the principal creditor and the co-surety; *Wolmershausen v. Gullick*, [1893] 2 Ch. 514.

**Art. 84.** *By an attorney or vakil for his costs of a suit or a particular business, there being no express agreement as to the time when such costs are to be paid; three years from the date of the termination of the suit or business, or (where the attorney or vakil properly discontinues the suit or business) the date of such discontinuance.*

### Notes.

This is the same as Art. 85 of Act IX of 1871.

This Article applies to suits only, and not to an application by a solicitor for a summary order of a High Court calling upon a party to a suit to shew cause why he should not pay his solicitor's costs, or in default be attached; there was in 1875 no limitation for such an application; *Abba Ishmail v. Abba Thara*, I. L. R. 1 Bomb. 253.

The decision in this case was that such an application was not a *suit*, but under the present practice, an order is made for the payment of the account of costs due, which is executed in the same way as a decree in a suit under the C. P. C. It may be argued that this is really a suit; see *In re Mansel*, W. N. 1892, p. 32.

The termination of a suit is the date when judgment is given; *Balkrishna v. Govind*, I. L. R. 7 Bomb. 518. No doubt, *primâ facie*, that is so, but when an appeal is brought, and the same attorney continues to conduct the suit in appeal that is a continuation of the original suit, and what was *primâ facie* a termination ceases to be so; *Harris v. Quine*, L. R. 4 Q. B. at p. 658. See, also, *Harris v. Osbourne*, 2 C. and M. 629. The Bombay decision quoted above may probably be correct in respect to pleaders appearing in suits in Mofussil Courts, but it would seem that it does not apply to suits in the High Court, where after judgment is given,

it is the duty of a solicitor to see that the decree is properly drawn up and costs regularly taxed; accordingly the Madras High Court has ruled that a suit is not at an end till costs are taxed and inserted in a decree; *Narayana Chetty v. Champion*, *I. L. R.* 7 *Mad.* 1; it has, however, been held in England that a suit is terminated when judgment is given, notwithstanding that some further charges incidental to the matter may be incurred afterwards; *Rothery v. Munnings*, 1 *B. and Ad.* 15; subject, of course, to its being continued in appeal; but, on the whole, it would appear that the law is that the retainer of a solicitor in a suit continues until the judgment has been worked out; *Bevins v. Hulme*, 15 *M. and W.* 88; *Lawrence v. Harrison*, *Style*, 426; approved of in *Lady de la Pole v. Dick*, 29 *Ch. D.* 351; *James v. Ricknell*, 20 *Q. B. D.* 164; but if in working out a judgment, interpleader proceedings come in, the retainer does not extend to them; *James v. Ricknell*, *ubi sup.* Where a solicitor was retained to obtain an affiliation order, and obtained one, it was held that his retainer thereupon ceased; *Reg. v. Justices of Oxfordshire* [1893], 2 *Q. B.* 149.

Where a solicitor was retained to execute a decree, and issued a prohibitory order against certain property after which no instructions were given to him to proceed further, but the parties settled the matter behind his back, and did not certify the adjustment to the Court; it was held that there had been no determination of the business for which he was retained, and that a suit brought more than three years after the settlement was not barred, *Hearn v. Bapu Naikin*, *I. L. R.* 1 *Bomb.* 505.

Where an attorney discontinues his business, he must shew a satisfactory reason for so doing, and must give his client reasonable notice of his intention to discontinue, if he wishes to recover his costs; *Nicholls v. Wilson*, 11 *M. and W.* 106.

**Art. 85.** *For the balance due on a mutual, open, and current account, where there have been reciprocal demands between the parties; three years from the close of the year in which the last item admitted or proved is entered in the account; such year to be computed as in the account.*

### Notes.

This corresponds to Art. 87 of Act IX of 1871, but under that article the date from which limitation ran was "the time of the last item admitted or proved in the account." It differs from Sect. 8 of Act XIV of 1859, that section having reference only to mutual accounts between merchants and traders; and, also, in the fact that under that section one transaction must be proved or admitted to have taken place within the period of limitation; *Hirada Basappa v. Gadigi Madappa*, 6 *Mad. H. C. Rep.* 142; but under this article all that need be proved is that one item in the accounts falls within some mercantile year to the end of which the accounts were usually made up, the last day of which is within the period of limitation.

*Mutual account with reciprocal demands.*—To be mutual there must be transactions on each side creating independent obligations on the other; and not merely transactions which create obligations on the one side, those on the other being merely complete or partial discharges of such obligations; *Hirada Basappa v. Gadigi Mudappa*, 8 *Mad. H. C. Rep.* 142; *Velu Pillai v. Ghose Mahomed*, 1 *L. R.* 17 *Mad.* 293.

This excludes a suit for the balance of money advanced in payment for goods to be subsequently supplied; *Boidonath Shah v. Lalunissa*, 7 *W. R.* 164; and a suit for money advanced on loan of which the defendant has repaid a portion; *Pearce Mohun v. Gobind Chrunder*, 10 *W. R.* 56. The most obvious case of mutual dealing with reciprocal demands is where A supplies B with one kind of goods or work, and obtains from him another kind, debiting him with the cost of the former and crediting him with the value of the latter. Such a case was that of *Srinath Das v. Park Pittar*, 5 *Ben. L. R.* 550; where the defendant indented on Europe through the plaintiff for goods for which he paid by acceptances, some of which were dishonoured, and the plaintiff bought from the defendant, for use in his own business, portions of the indents, with the cost of which the plaintiff credited the defendant; see, also, *Sitayya v. Rungareddi*, 1 *L. R.* 10 *Mad.* 259, where the plaintiff supplied goods to the

defendants, and the defendants supplied goods to the plaintiff, and also consigned goods to the plaintiff for sale. This Article is not, however, confined to such cases; it is sufficient that the dealings between the parties have been such that the balance of the accounts was sometimes on one side and sometimes on the other. Thus, where A remitted *hundis* to B, which B collected and placed to the credit of A, and A drew other *hundis* on B which were paid and placed to A's debit and A from time to time overdrew the amount standing to his credit; it was held that this was a mutual account; *Ghaseeram v. Manohar Dass*, 2 *Ind. Jur. N. S.* 241; followed by *Sargent, J.*, in *Narandas v. Vissandas*, *I. L. R.* 6 *Bomb.* 134; see, also, *Khushalo v. Behari Lal*, *I. L. R.* 3 *All.* 523; and *Sewa Ram v. Mohan Singh*, *Panjab. Rec.* No. 44 of 1886. Each party must have been able to say to the other "I have an account against you"; *Haji Syud v. Ashrufoomissa*, *I. L. R.* 5 *Calc.* at p. 763; but not necessarily at the same moment, it is sufficient if one party can say so at one time, and the other at another. It has also been ruled in Calcutta that this article was intended to apply to cases where an account has been going on between two parties and *balances have been struck* from time to time shewing the amount due from one party to the other, and the suit is brought to recover the balance due from one to the other; *Lalji Sahoo v. Rughoonundun*, *I. L. R.* 6. *Calc.* at p. 450; but this article does not, in terms, require that balances should have been actually struck; all that it requires is that the suit should be brought for the balance of an account which has been mutual; and the mutuality, so far as it depends upon the balance having been sometimes on one side of the account, and sometimes on the other, can be ascertained by the account itself shewing that if balances had actually been struck at various times, the balance at those times would have been sometimes in favour of the plaintiff and sometimes in favour of the defendant; it is not necessary that the balances at the end of each year should have so varied, though, of course, if the balance at such times was always against the defendant, it might be ground for inferring that the account was really not a mutual one. A employed B as his agent to manage

certain boats for which he was to receive a commission. B alone kept accounts in which he credited sums received for the hire of the boats, and debited amounts which had been paid for their up-keep and the commission due to him: held that this account shewed reciprocal demands, and that it fell under this Article; *Lakshmaya v. Jagganatham*, 1 L. R. 10 Mad. 199.

Where agents made advances to their principals, receiving goods in return which they sold and credited the proceeds against the advances, and the principals had agreed that whenever the balance should be struck, they would pay what (if anything) was due by them, it was held that a suit was brought within time if brought within three years of the last item in the account; *Watson v. Aga Mehede*, 1 I. A. 346. On the general question of mutual accounts, see, also, *Naoroji v. Chartered Bank of India*, L. R. 3 C. P. 444; and *Astley v. Gurney*, L. R. 4 C. P. 714.

The amount of mutuality is immaterial. One transaction of a proper kind in an account is sufficient to render it mutual; *Srinath Das v. Park Pittar*, 5 Ben. L. R. 550.

When mutual dealings cease, and the items appear on one side only of the account, it ceases to be a mutual account; *Haji Syud v. Ashrufoonissa*, 1 L. R. 5 Calc. 763; *S. C. sub nom. Askery Khan v. Ashrufoonissa*, 6 C. L. R. 112. The general principle of law is certainly that once an account is mutual, it continues so as long as the account continues. Still it is possible to imagine cases, of which the foregoing may be one, in which the parties have changed the character of their dealings and so what was once a mutual account may become an ordinary one. This ruling, however, seems somewhat to militate against that in 5 Ben. L. R. It must also be remembered that from the wording of the article it is evident that if an account be mutual in any part of a current year it must retain that character till the end of the year; consequently, if the character of the account can be changed, there must be at least a whole year in which there are no mutual dealings.

*Last item.*—The last admitted or proved item must be on the defendant's side of the account, in other words, it must be the



last reciprocal item; *Haji Syud v. Ashrufoonissa*, I. L. R. 5 Cal. at p. 764. This decision is open to the remark that the article on which this case was decided (Art. 87 of Act IX of 1871) did not so provide.

*Close of the year.*—If a mutual, open and current account be adjusted in the middle of a current year, and in that year there is entered one item admitted or proved, limitation will still run from the end of the year and not from the date of the adjustment; *Gunesh Lal v. Sheo Golam*, 5 C. L. R. 211.

**Art. 86.** *On a policy of insurance when the sum assured is payable immediately after proof of the death or loss has been given to or received by the insurers; three years from the date when proof of the death or loss is given or received to or by the insurers, whether by or from the plaintiff, or any other person.*

### Notes.

This is the same as Art. 88 of Act IX of 1871, except that the word “immediately” has been inserted after the word “payable.” This Article, therefore, applies only to cases where the sum assured is payable *immediately* after proof of loss or death is given, and not to cases where the sum is not payable until a certain time after the loss or death is proved; these cases would come under Art. 115.

In *Narotumdas v. Dayabhai*, 6 Bomb. H. C. Rep. A. C. J. 34, it was held that the underwriter's liability arose (subject to any special conditions as to time of payment) when he received *notice* of the loss. This article, however, makes limitation run from the date when *proof* of the loss is given. At sometime or other this expression will have to be interpreted by the Courts in India. If the underwriter admits proof has been given to him of the loss, then limitation will run from the date at which it was given, but he will probably be stopped from disputing the loss. If, on the other hand, he alleges that no proof was given to him then limitation has never begun to run. The question as to what was meant by proof of loss as used in a policy of insurance has arisen on two or three occasions in Bombay, but, unfortunately,

the cases were settled before they were tried. In England nothing more than notice is required.

The question of what is sufficient proof of a loss is touched upon in *Cossmann v. West*, 13 App. Ca. at p. 182, but, unfortunately, it is impossible from the report to make out what was held to be sufficient proof.

**Art. 87.** *By the assured to recover premia paid under a policy voidable at the election of the insurers; three years from the date when the insurers elect to avoid the policy.*

#### Note.

This Article is the same as Act. 89 of Act IX of 1871.

**Art. 88.** *Against a factor for an account; three years from the date when the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.*

#### Notes.

This Article corresponds to Art. 64 of Act IX of 1871, but the words "during the continuance of the agency," and "and refused" have been inserted.

A factor is a person who is entrusted with goods for sale on account of his principal, but inasmuch as he often makes advances upon such goods, he has possession of them, and a special property in them as well as a general lien upon them, and may sell in his own name.

A principal is entitled to demand an account from his factor at any reasonable time; *Lawless v. Calcutta Landing Co.*, I. L. R. 7 Calc. at p. 632; if he makes the demand and it is refused, then limitation in respect of the account demanded will commence to run from the date of refusal. Limitation will not run unless there has been both a demand and a refusal. If the agency continues till the factor dies, then the death will operate as a termination of the agency and limitation will commence to run in favour of the factor's heirs from the date of his death; *Kalee Kishen v. Juggut Tara*, 11 W. R. 76; *Lawless v. Calcutta Landing Co.*, I. L. R. 7 Calc. 627.

Where an account is demanded and promised at a certain time, but is not then furnished, it must be held that the account was refused at that time; *Hori Narain v. Administrator General*, 3 C. L. R. 446.

In cases in which the agency is terminated otherwise than by death, the fact of the determination must be proved by evidence, which may either be direct, as that the principal informed the factor that he was no longer going to employ him as such, or indirect, *i. e.*, facts from which the Court will infer that the agency terminated at a certain date. If the factor or agent set up a title in himself, adverse to his principal, that is a termination of the agency; *Kally Churn v. Dukhee*, 1. L. R. 5 Calc. at p. 698. If a *dewan* departs from his employer's service that is a determination of the agency; *Hurronath v. Krishna Coomar*, 13 I. A. p. 129. Where an agent for the sale of goods receives the price thereof, the agency does not terminate until he has paid the price to his principal, and a demand made by the principal before such payment for an account is made during the continuance of the agency; *Babu Ram v. Ram Dayal*, 1. L. R. 12 All. 541.

When a principal sues his agent for an account, he should also sue for an adjustment of the account and for payment to him of the balance found to be due on such adjustment; *Soshi Mohun v. Guru Churn*, 8 C. L. R. 285.

**Art. 89.** *By a principal against his agent for moveable property received by the latter and not accounted for; three years from the date when the account is, during the continuance of the agency, demanded and refused, or, where no such demand is made; when the agency terminates.*

### Notes.

This Article corresponds to Art. 90 of Art. IX of 1871, but in that article the time from which limitation ran was described as "when the account is demanded and refused."

This article does not necessarily apply to suits for the recovery of *specific* moveable property, but to *any* moveable property which the agent has to account for, either by return to

the principal or by shewing how he has disposed of it. For cases on various points which may arise under this article, see the notes to the previous article.

Money has been held to be moveable property under Art. 29 which refers to compensation for moveable property wrongfully taken under a decree; *Jaggivan Javherdas v. Gulam Jilany*, I. L. R. 8 Bomb. 17; but looking to the terms of the judgment in that case, *quære*, whether it would be moveable property under this article.

Where a suit is instituted against an agent for the recovery of a definite sum, with a prayer that that or any larger sum proved by the decision of the Court to be due by the agent may be decreed to be paid, it is virtually a suit for an account; *Hurro-nath v. Krishna Coomar*, 18 I. A. p. 127; I. L. R. 14 Calc. 147.

Where an account is demanded from a *dewan*, who, without expressly refusing to give an account, departs from the service of his master, limitation will run from the date of his departure; *ib.* A suit against the manager of a firm who was paid by a share of the profits in lieu of salary to recover money borrowed by him from the firm for personal expenses, and also his share of losses, falls under this article; *Ganesh v. Shankar*, *Panj. Rec.* No. 81 of 1891.

A deposited certain monies with B, a banker, and drew against them, but not to the full amount. The residue was employed by B as A's agent according to an agreement between them: it was held that, besides the relation of banker and customer, there subsisted between them the relation of principal and agent, and that, therefore, the right of action arose at the time of a demand by the plaintiff; *Nasir v. Dayachund*, 10 Bomb. H. C. Rep. 300; following *Tophan v. Braddick*, 1 Taunt, 572.

This article applies to a suit against the representatives of a deceased agent; *Chand Mal v. Kalia*, *Panj. Rec.* No. 96 of 1886.

A suit by one co-owner against another to declare the right of the former in the property owned and to obtain an account of profits is not a suit by a principal against his agent; *Muhammed Habbibulla v. Safdar Husein*, I. L. R. 7 All. 25.

**Art. 90.** *Other suits by principals against agents for neglect or misconduct; three years from the date when the neglect or misconduct becomes known to the plaintiff.*

### Notes.

This Article is the same as Art. 91 of Act IX of 1871.

A suit against an agent for loss caused by his neglect in not suing for debts due to his principal, or by so negligently selling his principal's property that the proceeds cannot be realized will fall under this Article; *Baboo Lall v. Vaughan*, 2 Agra, 306.

**Art. 91.** *To cancel or set aside an instrument not otherwise provided for; three years from the date when the facts entitling the plaintiff to have the instrument cancelled or set aside become known to him.*

### Notes.

This Article corresponds to Art. 92 of Act IX of 1871, but under that article limitation ran from the date when the instrument was executed.

Suits under Act I of 1877 (The Specific Relief Act), Chap. V. (of the cancellation of Instruments), will be governed as to limitation by this Article in cases which are not otherwise specially provided for.

This article applies to suits the main object of which is to cancel or set aside an instrument made either between the plaintiff and defendant; or between parties of which the plaintiff was not one; *Torab Ali v. Mahomed Amir*, 3 C. L. R. 105; *Bhawan v. Bisheshur*, I. L. R. 3 All. at p. 848; *Boo Jinatboo v. Sha Nagar*, I. L. R. 11 Bomb. 78. If there be other substantial relief prayed, and the cancellation or setting aside of an instrument be not actually necessary, or merely auxiliary, to the granting of such relief, this article does not apply; *Raj Bahadoor v. Achumbit Lal*, 6 C. L. R. 12; such as a suit to get possession of land; *Torab Ali v. Mahomed Amir*, *ubi sup.*; to declare a right to land; *Sikher Chund v. Dulputty Singh*, I. L. R. 5 Calc. 363; followed in *Boo Jinatboo v. Sha Nagar*, I. L. R. 11 Bomb. 78; and also in *Nabab Mir Sayad v. Yasinkhan*, I. L. R. 17 Bomb. 755;

and *Pachamuthu v. Chinnappan*, *I. L. R.* 10 *Mad.* 213; *Govind v. Mahadu*, *P. J.* 1889, p. 311; see, also, *Sobha Pandey v. Sahodra*, *I. L. R.* 5 *All.* 322; a suit for possession of land, with a prayer that a conditional sale during the minority of the plaintiff might be set aside; *Ramansar v. Raghubai*, *ib.* 490; followed in *Uma Shankar v. Kalka Prasad*, *I. L. R.* 6 *All.* 75; *Ikram Singh v. Intizam Ali*, *ib.* 260; a suit to recover property improperly alienated under a *kanon* instrument by a *karnavan* subsequently removed from office; *Unni v. Kunchi Amma*, *I. L. R.* 14 *Mad.* 26; a suit for partition on which it was alleged that the documents upon which the defendants relied in support of their title were fraudulent and colourable; *Abdul Rahim v. Kirparam*, *I. L. R.* 16 *Bomb.* 186; followed in *Sundaram v. Sithammal*, *I. L. R.* 16 *Mad.* 311. In such cases a prayer to set aside the deed may be treated as surplusage; *Param Singh v. Laljillal*, *I. L. R.* 1 *All.* at p. 409; see, also, the notes to the next two articles on the point. It has, however, been held by the High Court in Calcutta, commenting on *Raj Bahadoor v. Achumbit Lal*, *ubi sup.*, that where a transaction or instrument is not null and void, so as to permit the plaintiff to treat it as a nullity, but is done or made by a person with authority, and the transaction or instrument has *immediate effect* given to it so as to affect immoveable property, proceedings should be taken to set aside the transaction or instrument within the time allowed by law for that specific purpose; *Raghubai v. Bhikya Lal*, *I. L. R.* 12 *Calc.* 69; *Ghulam v. Ajub Gul*, *Panj. Rec.* No. 57 of 1891; see, also, the case of *Jagadamba v. Dakkhina*, 13 *I. A.* 84, discussed under Arts. 118, 119; and followed in *Moresh v. Taruck Nath*, 20 *I. A.* 30; and *I. L. R.* 20 *Calc.* 487; see, also, *Hasan v. Nazo*, *I. L. R.* 11 *All.* 456.

A suit for a declaration that a document was executed for nominal purposes and was not intended to take effect is not a suit to cancel or set aside the document, and, therefore, does not fall under this Article; *Nagathal v. Ponnusami*, *I. L. R.* 13 *Mad.* 44. The report of the judgment in this case is meagre, but this seems to be the point, and the only point, decided as regards limitation. This article does not apply to cases where the plain-

tiff sues for a declaration that a transaction between the defendants does not affect his right in the subject matter of such transaction; *Ram Chand v. Muhammad*, *Panj. Rec.* No. 135 of 1888; but Art. 120 applies; *Din Dial v. Har Narain*, *I. L. R.* 16 *All.* 73. A plaintiff who is not entitled to have deeds cancelled by reason of a suit for that form of relief being barred, may yet get a declaration that the deeds are not binding on him, *Rallia v. Sundar*, *Panj. Rec.* No. 83 of 1883.

It does not follow, because a man conveys property to which he is not entitled, that the conveyance is absolutely void and ought to be retained or cancelled by the Court; *Raikishori v. Debendranath*, 15 *I. A.* p. 49; *S. C.*, *I. L. R.* 15 *Calc.* p. 421.

*When the facts entitling the plaintiff, &c.*—This provision must be construed to mean “when the plaintiff having a knowledge of such facts, has a cause of action already accrued to him; and is in a position to maintain a suit”; *Tawangir Ali v. Kura Mal*, *I. L. R.* 3 *All.* 394. In this case the defendant had, on 1st December 1875, transferred certain property subject to an attachment before judgment in a suit which both the lower Courts dismissed, but which the High Court decreed in favour of the plaintiff on the 7th August 1876. The present suit was not brought till more than three years after the plaintiff knew of the transfer and nearly three years after the decree in the High Court. This decision seems to stretch the words of the Article very much, for there was ample time after the plaintiff had a cause of action (7th August 1876) for him to have sued within three years from the time he knew of the facts. See, also, *Meda v. Imaman*, *I. L. R.* 6 *All.* 207 (*F. B.*). In this case, however, the Court appears to have given judgment as if the case, came under the Act of 1871, as they speak about limitation as if it ran from the *date of the deed*, instead of as provided by this article.

Where the executant of a deed is not incapable at the time of execution of knowing the facts under which the deed was executed by him, and of allowing that knowledge to operate upon him, limitation will run from the time of execution, although a co-plaintiff may not have obtained knowledge of the facts until a

subsequent time; *Rani Janki v. Raja Ajit*, 14 I. A. 148; S. C., I. L. R. 15 Calc. 58.

The heir of a Mahomedan, who, at the time of execution, knows facts about a deed which would be sufficient to cause it to be set aside, is not entitled, after the death of the executant, to sue to set it aside, if, by lapse of time, the executant himself would under this Article, have been barred; *Hasan v. Nazo*, I. L. R. 11 All. 456.

**Art. 92.** *To declare the forgery of an instrument issued or registered; three years from the date when the issue or registration becomes known to the plaintiff.*

**Art. 93.** *To declare the forgery of an instrument attempted to be enforced against the plaintiff; three years from the date of the attempt.*

### Notes.

These two Articles correspond to Art. 93 of Act IX of 1871, but under that Article limitation began to run from the date of the issue, registration, or attempt. The division of that article into two meets the difficulty raised in the case of *Fakharuddin v. Official Trustee*, 8 I. A. 197; S. C., I. L. R. 8 Calc. 178; affirming on this point the decision of the High Court at Calcutta in the same case, reported in I. L. R. 4 Calc. 209, which is of no further use under these Articles as they now stand.

These Articles apply only to suits, the sole or main object of which is to declare the forgery; *Trilocun v. Nobikishore*, 2 O. L. R. 10; *Nistaring v. Anundmoye*, *ib.* 561; see, also, the notes to Art. 91 on this point.

**Art. 94.** *For property which the plaintiff has conveyed while insane; three years from the date when the plaintiff is restored to sanity, and has knowledge of the conveyance.*

### Notes.

This Article is the same as Art. 94 of Act IX of 1871; and applies to suits for the recovery of property. Two events must happen before limitation begins to run:—the plaintiff must be restored to sanity, and must have knowledge of the conveyance.



This knowledge would probably be held to mean, not merely knowledge of the fact that he had executed a conveyance, but knowledge of the contents and effect of it, which must presumably be acquired after his restoration to health, but the article does not say so, and a case may easily be imagined in which the plaintiff had a perfect knowledge of the conveyance before he became sane, in which case perhaps limitation might run from the date of his becoming sane. As to what knowledge is, see the notes to the next Article.

**Art. 95.** *To set aside a decree obtained by fraud, or for other relief on the ground of fraud; three years from the date when the fraud becomes known to the party wronged.*

### Notes.

This Article is the same as Arts. 95 and 96 of Act IX of 1871 combined without any alteration.

The cause of action must be the fraud itself; *Shapurji Jehangirji v. Superintendent of Poona Jail*, 12 Bomb. H. C. Rep. 238; *Uma Shankar v. Kalka Prasad*, I. L. R. 6 All. 75; *Natha v. Jadha*, ib. at p. 414; *Burjorji v. Dhunbai*, I. L. R. 16 Bomb. 1. It applies to all cases where the plaintiff has done or suffered anything through the fraud of the defendant; *Chunder Nath v. Tirthanund*, I. L. R. 3 Calc. at p. 507; or where persons have fraudulently done anything which injures the plaintiff's rights, and in such cases this Article gives a plaintiff a longer time in which to sue than he would have had if there had been no fraud, and no other Article applies when fraud is the basis of relief; *Opendar Narain v. Gudadhur Dey*, 25 W. R. 476; *Natha v. Jadha*, ubi sup.; *Boobhun Chunder v. Ram Soonder*, I. L. R. 3 Calc. 30; *Muhammed Buksh v. Muhammed Ali*, I. L. R. 5 All. 294.

This Article does not apply to suits for which a special period of limitation is provided by some other Act, although the plaintiff's cause of action is based upon fraud, but such a suit must be brought within the time limited by the Act, calculating such time from the date when the fraud became known to the plaintiff; *Venkata v. Chengadu*, I. L. R. 12 Mad. 168; nor is it

applicable to cases where, although relief on the ground of fraud is asked for, that relief is only ancillary to the main relief prayed for in the suit, *e. g.*, a declaration of the plaintiff's title to the property in dispute in the suit; *Burjorji v. Dhunbai*, *I. L. R.* 16 *Bomb.* 1; and the cases cited therein; *Abdul Rahim v. Kirparam*, *ib.* 186.

This Article does not apply to a suit on an indemnity against fraudulent conduct on the part of a third person; *Shapurji Jehangirji v. Superintendent of Poona Jail*, *ubi sup.*; nor to a case where fraud is merely a part of the machinery by which the defendants have kept the plaintiff out of a knowledge of his rights; *Chunder Nath v. Tirthanund*, *I. L. R.* 3 *Calc.* at p. 507.

In cases which would otherwise fall under Art. 12, if fraud is alleged in the sale which it is sought to set aside, this Article only is applicable, and the plaintiff has three years from the date when he discovers the fraud in which to bring his suit; *Parekh Ranchor v. Bai Vakhat*, *I. L. R.* 11 *Bomb.* 119; *Bajaji v. Pirchand*, *I. L. R.* 13 *Bomb.* 221. Where land has been fraudulently sold for Government revenue when none was due, this Article applies; *Venkatapathi v. Subramanya*, *I. L. R.* 9 *Mad.* 457.

A suit to set aside a *mulgeni* lease granted without authority, although the granting of lease may have been a fraudulent transaction, does not fall under this Article, but is governed by the general rule of limitation regarding the recovery of immoveable property; *Bellakeri v. Karur*, *P. J.* 1891, p. 60.

*Knowledge.*—For the cases shewing what constitutes knowledge, see under Sect. 18, *ante*, p. 75.

**Art. 96.** *For relief on the ground of mistake; three years from the date when the mistake becomes known to the plaintiff.*

### Notes.

This article corresponds to Art. 97 of Act IX of 1871, but that article applied only to "mistake in fact." This article would also apply to a case of mistake in law as well in fact, whenever a mistake in law furnished ground for a suit.

For the principles which govern relief against mistakes in law, see *Cooper v. Phibbs*, L. R. 2 H. L. 170; *McCarthy v. Decaie*, 2 Russ. and My. 614; *Livesey v. Livesey*, 3 Russ. 287; *Earl Beauchamp v. Winn*, L. R. 6 H. L. 284.; *Daniell v. Sinclair*, 6 App. Ca. 181.

The true meaning of *ignorantia juris non excusat* is that parties cannot excuse themselves from all civil or criminal consequences of their acts by alleging ignorance of the law, but there is no presumption that parties must be taken to know all the legal consequence of their acts, especially where difficult questions of law, or the practice of the Court, are involved; *per Lord Fitz Gerald in Seaton v. Seaton*, 13 App. Ca. at p. 78.

The mistake may be that of the plaintiff, or of a third party through which the plaintiff's rights have been affected; *Venkata v. Krishnasami*, I. L. R. 6 Mad. at p. 350. Where the plaintiff by mistake paid a larger sum than was actually claimable as road and public works cess to the defendants, it was held that the suit fell under this Article, and that it was not governed by the one year's limitation of Sect. 27, Ben. Act VIII of 1869; *Mathura v. Debendra*, I. L. R. 12 Calc. 538.

**Art. 97.** *For money paid upon an existing consideration which afterwards fails; three years from the date of the failure.*

### Notes.

This Article is the same as Art. 98 of Act. IX of 1871.

Under English law money so paid could be sued for as money received by the defendant to the use of the plaintiff; but in India the suit ought to be framed so as to fall under this Article, as limitation hereunder is more favourable to the plaintiff.

Where a mortgage deed contained no personal covenant by the mortgagor to repay the money and through his default the mortgage security is lost, the money due thereon may be recovered from him as money due on failure of consideration within three years from the loss of the security; *Sanwara v. Abaji*, I. L. R. 11 Bomb. 475; see, also, *Balaji v. Daji*, P. J. 1884, p. 59. Where a sale is made of land which is not necessarily void, but only voidable if objection is taken to it by other members of a

joint family, and the purchaser attempts to take possession of the land, but is successfully opposed by the members of the joint family; on such opposition there is a failure of consideration, and limitation to a suit to recover the purchase money will run from the date the purchaser was prevented from taking possession; *Hanuman v. Hanuman*, 18 I. A. 158; I. L. R. 19 Calc. 123. Where the defendant borrowed money from the plaintiff on an unregistered mortgage, and put him in possession, but subsequently, taking advantage of the non-registration of the mortgage, deprived the plaintiff of his possession; a suit to recover the amount of the money advanced falls under this article, and limitation runs from the time possession was re-taken by the defendant; *Gurmukh Singh v. Chandu Shah*, Panj. Rec. No. 193 of 1888.

Where the purchase-money for an annuity was sought to be recovered on the ground that part of the security for the annuity had failed, time was, in England, held to have commenced to run in favour of the seller of the annuity from the date of the failure of the security; *Huggins v. Coates*, 5 Q. B. 432; and where an annuity granted to a purchaser was invalid against the grantor because the memorial under the then existing Annuity Acts was incomplete; it was held that the cause of action against the grantor was not complete until he had elected to take advantage of the defect in the memorial; *Cowper v. Godmond*, 9 Bing. 748; because until then he might probably have made the annuity valid as against him by completing the memorial; see, also, the notes under Art. 62. The respondent, being indebted to the appellant, agreed to sell him certain property, setting off the debt against the purchase-money. No money was paid, and disputes arising as to other terms of the agreement the respondent unsuccessfully sued to enforce it. Being afterwards sued for his debt, he pleaded limitation, but it was held that the dismissal of his suit amounted to a failure of consideration in respect of the amount of the debt agreed to be set off against the purchase-money, and that the starting point for limitation was the date of the dismissal of the respondent's suit; *Mussammut Basso v. Lala Dhum*, 15 I. A. 211; S. C. *sub nom. Basu Kuar v. Dhum Sing*, I. L. R. 11 All. 47.

Where the consideration for an agreement was that the defendant's brother should not execute a decree, which was subsequently executed in breach of the agreement, and the plaintiff sues to recover the amount paid to the defendant, the suit will fall under this Article; *Lingapa Hegde v. Vykunth Naik*, P. J. 1883, p. 56.

Where immoveable property was agreed to be sold at a certain price, payable when the sale was completed, a portion of which was to be made up by the purchaser wiping off, a debt due to him by the vendor, and the sale eventually went off, it was held that the purchaser could not subsequently treat the amount of the debt due to him as money paid by him to the vendor as part of the purchase-money, and recover it from him as money paid on a consideration which had failed; *Dhum Singh v. Ganga Ram*, I. L. R. 8 All. 214.

Where a pre-emptor decree-holder paid a sum of money to the defendant pending an appeal from a decree for pre-emption, and the Appellate Court ordered a larger sum to be paid within a certain time, which was not done, in consequence of which the decree became void, and the pre-emptor sued the defendant to recover the sum he had paid: it was held that the suit fell under this Article, but that if it did not, it would fall under Art. 120; *Koji Ram v. Ishar Das*, I. L. R. 8 All. 273.

**Art. 98.** *To make good out of the general estate of a deceased trustee the loss occasioned by a breach of trust; three years from the date of the trustee's death, or, if the loss has not then resulted, the date of the loss.*

### Note.

This Article is the same as Art. 99 of Act IX of 1871, except that the word "resulted" is substituted for "been occasioned."

**Art. 99.** *For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers; three years from the date of the plaintiff's advance in excess of his own share.*

### Notes.

This Article is the same as Art. 100 of Act IX of 1871. Act XIV of 1859 made no special provision for such suits as are provided for by this Article, and it was held that such suits came under the general clause for suits not otherwise provided for, and not under that for breach of contract; *Doorga Monse v. Mohun Das*, 2 W. R. 266.

This Article only applies to contribution in respect of *joint decrees* and *payments on account of revenue*; suits by a manager of a joint family for contribution towards payments on account of the family fall under Art. 107; between sureties, under Art. 82; and other cases of contribution, either under Art. 83, or Art. 115.

*Payment.*—*Mitter and Maclean, JJ.*, in *Fackoruddeen v. Mohima Chunder*, 1 L. R. 4 Calc. 529, doubted whether the satisfaction of a decree by sale of the plaintiff's property was a payment by the plaintiff or whether the case came under Art. 115; but it seems strange that where the plaintiff's property provides the means for payment, it should not be held to be a payment by him, if he chooses so to treat it, as much as if he had himself sold his property and paid the money to the judgment-creditor. In such a case, however, limitation would run from the date the judgment-creditor took the money out of Court, and not from the date of the auction sale; *ib.* Where the money is paid in the ordinary way, limitation runs from the time excess payment is actually made to the decree-holder; *Radha Kristo v. Rup Chunder*, 3 C. L. R. 480.

This Article does not apply to a case where the plaintiff is compelled to pay revenue, which ought *wholly* to be paid by the defendant. If the amount so paid becomes a charge upon the land, the case will fall under Art. 132; *Ram Dutt v. Horakh Narain*, 1 L. R. 6 Calc. 549; *contra*, *Kinu Ram v. Mozuffer Hosain*, 1 L. R. 14 Calc. 809; *Khub Lal v. Pudmanund*, 1 L. R. 15 Calc. 542.

Where two persons had a joint holding from a *mittadar*, and one of them paid the whole of the *mittadar's* dues, it was held that

his suit for contribution from his co-owner fell under this article; *Thanikachella v. Shudachella*, I. L. R. 15 Mad. 258.

In *Syud Enayet v. Muddum Moree*, 14 Ben. L. R. 15; S. C. 22 W. R. 411; acting on cases therein cited, the Court held that a co-sharer compelled to pay the whole of the revenue of a talook acquired a charge on the shares of his co-sharers; this would bring the case under Art. 132, and it had been so held in *Deo Nundun v. Deshputty Singh*, 8 C. L. R. 210, n.; but the question still has to be decided whether the Legislature by providing this Article, did not intend to take all such payments of revenue out of the provision of Art. 132, as the point was not brought to the notice of the Judges in that case. The High Court in Bombay in *Achut Ramchundra v. Hari Kamti*, I. L. R. 11 Bomb. 313, has, however, held that Art. 132 would apply in such a case, but that when the plaintiff claiming as owner has paid the whole revenue, and subsequently other persons have established their right as co-owners, he must bring a suit against them for contribution within three years and gets no charge upon the property. See, also, the cases cited on this point under Art. 132.

**Art. 100.** *By a co-trustee to enforce against the estate of a deceased trustee a claim for contribution; three years from the date when the right to contribution accrues.*

#### Note.

This Article is the same as Art. 101 of Act IX of 1871.

**Art. 101.** *For a seaman's wages; three years from the end of the voyage during which the wages are earned.*

#### Notes.

This is the same as Art. 102 of Act IX of 1871.

The provisions for the payment of, and the means of recovering, seamen's wages are provided for in 57 and 58 Vict. c. 60, ss. 155 to 166; Act I of 1859, ss. 41, 44, 45, 53, 55 to 58, and 113; and Act XIII of 1878, ss. 1, 2. This Article does not interfere with any periods limited for summary proceedings, but applies only to suits for seamen's wages in those cases in which suits can be filed.

**Art. 102.** *For wages not otherwise expressly provided for by this schedule ; three years from the date when the wages accrue due.*

### Note.

This Article is new. Wages of workmen on railways and other public works are provided for by Art. 4; those of household servants and artisans by Art. 7; and those of seamen by Art. 101. This Article provides for the wages of all persons who do not come within the other Articles.

**Art. 103.** *By a Muhammadan for exigible dower (mu'ajjal); three years from the date when the dower is demanded and refused, or (where during the continuance of the marriage no such demand has been made) when the marriage is dissolved by death or divorce.*

**Art. 104.** *By a Muhammadan for deferred dower (mu'wajjal); three years from the date when the marriage is dissolved by death or divorce.*

### Notes.

These Articles are the same as Arts. 103 and 104 of Act IX of 1871.

Art. 103 is in accordance with decisions in *Ameeroonissa v. Moorad-oon-Nissa*, 6 Moore I. A. 211; and *Mulleka v. Jumeela*, I. A. Sup. vol. 135; S. C. 11 Ben. L. R. 375; as to the time from which limitation commences to run.

There must be a clear and unambiguous demand and refusal before limitation will begin to run; *Khajooroonissa v. Mirza Sarfoollah*, 15 Ben. L. R. at p. 316 (P. O.); S. C. 24 W. R. 168; *Hajra v. Mehr Ali*, Panj. Rec. No. 63 of 1892. A petition for leave to sue in *forma pauperis* for the dower claimed, which never becomes a plaint, is not such a demand; *Khajooroonissa v. Mirza Sarfoollah*, *ubi sup.*; reversing the decree of the High Court reported in 5 Ben. L. R. 84.

Where dower is not expressed to be either prompt or deferred, it must be taken that the whole is due on demand; *Mirza Bedar v. Mirza Khurum*, 19 W. R. at p. 315 (P. O.).

Art. 104 is in accordance with the decision in *Mir Mahar v. Amani*, 2 Ben. L. R. 306, as to the time whence limitation runs in the case of deferred dower. It also settles the *quære* in *Mirza*



*Bedar v. Mirza Khurum, ubi sup.*, as to whether, where no time is limited for the payment of deferred dower, it must be presumed to be payable on the death of either husband or wife, or on the death of the husband only.

Both articles, by the period of limitation fixed, three years, class claims for dower among money demands founded on a contract, as was done in case of *Mir Mahar v. Amani, ubi sup.*

**Art. 105.** *By a mortgagor after the mortgage has been satisfied, to recover surplus collections received by the mortgagee; three years from the date when the mortgagor re-enters on the mortgaged property.*

#### Note.

This Article corresponds with Art. 105 of Act IX of 1871, but in that Act limitation ran from the date of the receipt.

**Art. 106.** *For an account and share of the profits of a dissolved partnership; three years from the date of the dissolution.*

#### Notes.

This Article is the same as Art. 106 of Act IX of 1871.

This Article does not apply to a suit to recover a share in a sum received by a partner within the period of limitation, in respect of partnership transactions, although the right to sue for a general account of the partnership may be barred; *Merwanji Hormusji v. Rustomji Burjorji*, I. L. R. 6 Bomb. 628; following *Dayal Jairaj v. Khatao Indha*, 12 Bomb. H. C. Rep. 107-111; and *Knox v. Gye*, L. R. 5 H. L. 656; and the same principle would apply to a suit to recover a proportionate part of a partnership debt paid under similar circumstances; *Dayal Jairaj v. Khatao Indha, ubi sup.*

For a case in which a partnership was held not to be dissolved, see *Harrison v. Delhi and London Bank*, I. L. R. 4 All. 437.

**Art. 107.** *By the manager of a joint estate of an undivided family for contribution in respect of a payment, made by him on account of the estate; three years from the date of the payment.*

### Notes.

This Article is the same as Art. 107 of Act IX of 1871, except that that Article only applied to the joint estate of Hindus.

Where the manager of a joint family had borrowed money and applied it for the purposes of the family, and had subsequently borrowed money to pay off the former loan, and had then paid off the second loan from his own private funds; it was held that limitation ran from the date on which he had expended the first loan for family purposes; *Ram Kristo v. Muddun Gopal*, 12 W. R. 194; 6 Ben. L. R. Ap. 103; *Sunker Pershad v. Goury Pershad*, I. L. R. 5 Calc. 321; *Aghore Nath v. Grish Chunder*, I. L. R. 20 Calc. 18.

**Art. 108.** *By a lessor for the value of trees cut down by his lessee contrary to the terms of the lease; three years from the date when the trees are cut down.*

### Note.

This Article is the same as Art. 108 of Act IX of 1871.

**Art. 109.** *For the profits of immoveable property belonging to the plaintiff which have been wrongfully received by the defendant; three years from the date when the profits are received, or, where the plaintiff has been dispossessed by a decree afterwards set aside on appeal, when he recovers possession.*

### Notes.

This Article corresponds to Art. 109 of Act IX of 1871, but the words "when he recovers possession" are substituted for "the date of the decree of the Appeal Court."

*Wrongfully.*—A wrongful receipt is a receipt by the defendant of profits to which he has no legal title at the time of receipt, or only a title which by a subsequent decree is declared not to be a legal one; there is no necessity that there should have been any *mala fides* in the receipt by the defendant; *Byjnath Pershad v. Budhoo Singh*, 10 W. R. 486.

Where a plaintiff had obtained from the Court of the Settlement Officer a decree for a sub-settlement enjoyable for life, and this decree was set aside, whereupon the manager under the

Oudh Taluqdar's Relief Act of 1870 took possession and dispossessed the plaintiff, who however, on appeal to the Privy Council, got the original decree restored; it was held that the possession of the manager was not under a decree which was reversed on appeal, and that only three years' arrears of mesne profits could be recovered from him; *Kishnanand v. Kunwar Partab*, *I. L. R.* 10 *Calc.* 785 (P. C.). Where a defendant in possession under a decree ejecting the plaintiff, carries away crops standing on the land, and the decree is afterwards set aside; the case falls under this Article; *Shurnomoyee v. Pattarri Sirkar*, *I. L. R.* 4 *Calc.* 625.

A suit by a village *joshi* to recover fees received by a person who has wrongfully exercised that office is a suit for the profits of immoveable property; *Damodar Abaji v. Martand Apaji*, *P. J.* 1875, p. 293.

**Art. 110.** *For arrears of rent; three years from the date when the arrears become due.*

### Notes.

This Article is the same as Art. 110 of Act IX of 1871.

This Article applies only to rent, *i. e.*, money payable by a tenant to a landlord under a contract between them; it does not apply to compensation recoverable for use and occupation of premises from a person between whom and the plaintiff the relation of landlord and tenant has not been established; see *Debnath Roy v. Gudadhur Dey*, 18 *W. R.* at p. 139; but where the defendant is the purchaser of a putni-tenure of land within the plaintiff's zemindari the relation of landlord and tenant does exist; *Ram Runjun v. Ram Lall*, 5 *C. L. R.* 62. Where a person in a position to sue for excess rent brings a suit in the alternative form asking for *khas* possession, or a declaration that he is entitled to excess rent, and obtains a declaratory decree only, he cannot, when suing for arrears of rent under the declaratory decree, recover more than the rent for the number of years allowed by the Limitation Act; *Hurro Kumar v. Kali Krishna*, *I. L. R.* 17 *Calc.* 251.

Where a landlord tendered a *patta* to his tenant, the form of which was objected to, and he sued to enforce it, but the Court decreed that the *patta* ought to be in a different form, the plaintiff's right to sue for rent only commences from the date of the decree settling the form ; *Sobhanadri v. Chalumanna*, I. L. R. 17 Mad. 225.

Where rent is payable yearly, the last day on which a suit can be instituted for recovery of any one year's rent is the last day of the third year from the close of the year in which the rent became payable ; *Kushikant v. Rohinikant*, I. L. R. 6 Calc. 325.. Thus rent for the year 1883 cannot be sued for later than the 31st December 1886. A suit for *merais*, or customary dues, payable to a *Chattram* is not a suit for rent, and does not fall under this Article but under Art. 120 ; *Venkatavaraga v. District Board of Tanjore*, I. L. R. 16 Mad. 305.

Where no suit can be brought directly to recover possession of land, by reason of its being barred by limitation, none can be brought to recover rent or compensation for use and occupation ; *Chundrabullee v. Lukhee*, 5 W. R. P. C. 1 ; 10 Moore I. A. 214.

**Art. 111.** *By a vendor of immoveable property to enforce his lien for unpaid purchase-money ; three years from the time fixed for completing the sale, or (where the title is accepted after the time fixed for completion) the date of the acceptance.*

### Note.

This Article is the same as Art. 111 of Act IX of 1871.

**Art. 112.** *For a call by a company registered under any Statute or Act ; three years from the date when the call is payable.*

### Notes.

This Article corresponds to Art. 112 of Act IX of 1871, but under that Act limitation ran from the date when the call was made.

In the case of the *Parell Spinning and Weaving Co., Limited v. Manek Hajee*, I. L. R. 10 Bomb. 483, *Jardine, J.*, held that this Article did not apply to the case of a company in liquidation suing through their liquidator for the amount of unpaid calls made

by the directors whilst the company was working, but that Art. 120 was applicable. The learned Judge relied principally on the case of *In re Whitehouse and Co., Limited*, 9 Ch. D. 595, to shew that the liquidator suing on behalf of a liquidating company was in a different position to the company, while solvent, suing on its own behalf. In that case, however, the liquidator had not filed a suit, but had taken out a summons under the Companies' Act, and the question to be determined was not one of limitation, but of set-off. All the provisions of that Act undoubtedly applied, and one of those provisions was that in a limited company a contributory had no right of set-off, unless all the debts of the company had been paid. Consequently the contributories had to pay up the whole amount due from them, and were not allowed to set-off debts due to them by the company. In this case *Jessel*, M.R., disapproved of *Brighton Arcade Co. v. Dowling*, L.R. 3 C. P. 175, on the ground that, although in an action the right of set-off would be applicable unless the other side shewed a negative, yet the provisions of the Companies' Act supplied that negative; *ib.* at p. 605. While the Companies' Act makes a distinct provision in respect of set-off, it makes none for limitation; consequently the ordinary law of limitation is not interfered with by that Act. The period of limitation depends upon the *form* of proceeding taken to enforce a liability, *e. g.*, whether it be a suit or a summons in chambers; and in some cases a suit might be barred and yet the same relief might be obtained by a summary application to the Court, *e. g.*, an attorney must *sue* for his costs within three years, but it has been held that there is no limitation if he applies to a Judge in Chambers for an order upon his client to pay his costs; see the notes to Art. 84. If a liquidator chooses to bring a suit in the name of the company of which he is liquidator for calls made by the directors, the limitation applicable to a suit by a company for suits of this description will apply, because the suit is brought by the company to enforce a liability created before the winding-up order was made, although it must, in consequence of legal infirmity, be brought through the liquidator, and the company is in the same position as a minor or a lunatic suing through his next friend or committee, it is still the plaintiff.

It was in the power of the liquidator to have obtained an order of Court calling up the full amount of the shares and allowing credit to the contributories for any sums paid by them for calls. On that the liquidator could have got a balance-order ascertaining the balance due from each contributory, which could have been executed, and no question of limitation could have been raised. The Master of the Rolls in the case of *In re National Funds Assurance Co.*, 10 Ch. D. at p. 125, expressly distinguishes between the position of a liquidator suing shareholders or third parties, and a liquidator seeking relief under a summons issued by the Court in the winding up of a company; and in *Waterhouse v. Jamieson*, L. R. 2 H. L. Sc. 29, a majority of the Lords who decided the case and expressed any opinion on the point, held that the liquidator was merely substituted for the company, and that he could not recover that which the company itself could not recover. The difference in the liabilities of the contributory under a suit by the liquidator for calls made by the directors and under a call made by the Court is that in the former case the liability is that created by the call before the liquidation, and the liquidator can only enforce so much of the contract or duty which is created by the call as is still subsisting, and could be enforced by the company; whereas the latter is a liability which is created by the act of the Court subsequently to the company going into liquidation under the powers given by the Act, by virtue of which a number of new liabilities and equities, which arise by reason of the winding-up order, can be and are taken into account and enforced.

A trustee in bankruptcy stands in very much the same position as the liquidator of a company, and limitation runs against him in the same way as it would against the bankrupt himself; *In re Mansel*, W. N. 1892, p. 32 (C. A.)

**Art. 113.** *For specific performance of a contract; three years from the date fixed for performance, or if no such date is fixed, when the plaintiff has notice that performance is refused.*

#### Notes.

This Article corresponds to Art. 113 of Act IX of 1871, but under that Act limitation ran from the time when the plaintiff

had notice that his right was denied. The change in the description of the period whence limitation runs will cause some of the cases under the Act of 1871 to be of no authority under this Act.

A suit for money, based on an award which directed it to be paid to the plaintiff, is virtually a suit for specific performance of a contract and falls under this Article; *Sukho v. Ram Sukh*, I. L. R. 5 All. 263; followed in *Daji v. Waman*, P. J. 1889, p. 334; and in *Raghubar v. Madan Mohan*, I. L. R. 16 All. 3.

Where a vendor sold property of which he was not in possession, and the deed of sale contained no undertaking by the vendor to put the purchaser in possession, and the vendor having obtained possession, the purchaser sued him for the land; it was held that the case did not fall under this Article, but under Art. 136 or 144; *Sheo Prasad v. Udai Singh*, I. L. R. 2 All. 718. A suit for recovery of possession of land, based upon a compromise in a former suit, is not a suit for specific performance of a contract, but falls under Art. 144; *Betts v. Mahomed Ishmael*, 25 W. R. 521. The same principle is laid down in *Mewa v. Hulas*, 18 Ben. L. R. 312 (P. C.)

Where two brothers, on a partial partition of joint property, agreed that if either wished to leave the house in which they were living, he was bound to offer his share to the other at a certain price; or, if he wished to purchase the share of the other, and the other refused to sell, the party refusing was bound to buy at a certain price the other's share; it was held that no cause of action arose until demand and refusal; *Virasami v. Ramasami*, I. L. R. 3 Mad. 87; distinguishing *Venkappa v. Akku*, 7 Mad. H. C. Rep. 219, in which it was held, that, where an agreement provided "if you and your posterity pay in lump the Rs. 175, we will hand over the land to you," the right to enforce performance arose immediately on the agreement being executed; but *quære*, whether this also was not a contract to be executed on demand. Where a defendant, in consequence of an undertaking subsequently carried out, agreed to admit the plaintiffs who were his uterine brothers, to a share of the property of his adoptive father: it was held that the defendant was in a posi-

tion to fulfill that contract on the death of his adoptive parents, and that a suit not having been brought to carry out the contract within three years from the latter of these deaths, it was barred; *Mohadeo v. Nundun*, 12 *W. R.* 22. The plaintiff and defendant exchanged certain lands, each engaging to make good any loss caused to the other by reason of want of title to any of the lands, so exchanged. In 1882, the plaintiff, in a suit to which the defendant was a party, was declared not to be entitled to a portion of the land received from the defendant in exchange. The defendant refused to give the plaintiff, other land in the place of that lost by him, and the plaintiff, in 1885, sued the defendant for specific performance of his agreement: and it was held that, as the suit was brought within three years of the defendant's refusal, it was in time; *Hari Tewari v. Raghunnath*, 11 *L. R.* 11 *All.* 27.

Certain shares were allotted to S on the understanding that they should be transferred to the plaintiff on his paying up the full amount, which he did in 1862, and thenceforth received the dividends in respect thereof, but they were not transferred into his name. In 1874 the plaintiff brought a suit against the executor of S to compel registration of the shares in his name. It was held that the suit fell under the corresponding Article of Act IX of 1871, and was not barred, because neither S nor his executor had denied the right of the plaintiff till just before the suit; *Ahmed Mahomed v. Adjein Dooply*, 1 *L. R.* 2 *Calc.* 323. *Quære*, whether this is an authority now, because the time fixed for the performance of the contract was when the shares were paid for, which was in 1862. Where a contract is to be carried out at the request of one of the parties, his right is not denied until after demand and refusal; *New Beerbhoom Coal Co. v. Buloram*, 5 *L. R.* 175 *Calc.* (under Act IX of 1871); and the limitation would run from the same date under this Article.

If a suit for a specific performance of a contract of sale of immoveable property is barred, no suit can be maintained for possession of the same property by virtue of the right acquired under the contract of sale; *Muhi-ud-din v. Majlis Rai*, 6 *L. R.* 231.



This Article provides that a suit for specific performance of a contract shall not be brought after a certain period has elapsed, but if a plaintiff is guilty of laches within that time, he may be refused a decree under the provisions of Act I of 1877, Sect. 22, which provides that "the Court is not bound to grant such relief merely because it is lawful to do so." See *Umkone Lall v. Chotay Lall*, I. L. R. 10 Cal. at pp. 1068, 1070.

**Art. 114.** *For the rescission of a contract ; three years from the date when the facts entitling the plaintiff to have the contract rescinded first become known to him.*

### Notes.

This Article corresponds with Art. 114 of Act IX of 1871, but under that Article limitation ran from the date when the contract was executed by the plaintiff.

The rules regulating the rescission of contracts will be found in Act I of 1877, Chapter IV.

This Article applies to suits between the promisor and promisee to rescind the contract between them, not to suits by third parties to have an instrument cancelled or set aside ; *Bhawani v. Bishe-shar*, I. L. R. 3 All. 846.

**Art. 115.** *For compensation for the breach of any contract, express or implied, not in writing registered, and not herein specially provided for ; three years from the date when the contract is broken, or (where there are successive breaches) when the breach in respect of which the suit is instituted occurs, or (where the breach is continuing) when it ceases.*

### Notes.

This Article is the same as Art. 115 of Act IX of 1871, except that there is a slight verbal alteration in the third column which in no way alters the sense.

In cases falling under the Dekhan Agriculturists' Act, the time under this Article is extended to six years ; Act XXIII of 1881, Sect. 17.

*Compensation* is not ordinarily used as an equivalent for "damages," but as representing what may be claimed for injury caused by a lawful act; *Dixon v. Calcraft*, [1892] 1 Q. B. p. 463; but in many cases it would be assessed in the same way as damages; *Skinner's Co. v. Knight*, [1891] 2 Q. B. p. 545.

*Compensation* is the term employed in the Indian Contract Act, Sect. 73, to denote the payment which a party is entitled to claim on account of loss or damage arising from a breach of contract; and a contract to pay money not fulfilled causes loss for which the proper compensation is a decree to pay the amount promised; *Vythilinga v. Thetchanamurti*, I. L. R. 3 Mad. 76; *Ganesh Krishn v. Madhavrav Ravji*, I. L. R. 6 Bomb. 75; *Nabocoomar v. Siru Mullick*, I. L. R. 6 Calc. 94; *Harender v. Administrator-General*, I. L. R. 12 Calc. 357. The words "breach of any contract" in Act XIV of 1859, Sect. 1, Cl. 9, do not restrict the operation of the clause to suits for unliquidated damages for breach of contract as distinguished from suits for definite sums of money agreed to be paid under any contract; *Dukur Pershad v. Foolcoomaree*, 14 Moore I. A. 134; *S. C.* 16 W. R. P. C. 35. A suit against a *del credere* agent for the value of goods sold by him is a suit on a breach of contract; *ib.*

Where the defendant had agreed to pay a certain rate per acre for lands of his which were watered by a canal of the plaintiff's but which he did not pay, a suit to recover the amount due would not be one for rent, but would fall under this Article; *Ala v. Sodhi*, Panj. Rec. No. 171 of 1883.

Where goods contracted for have been paid for in advance, and then short-delivered, a suit to recover the value of the short delivery will fall under this Article; *Edulji v. Arjun Das*, Panj. Rec. No. 22 of 1883.

The breach by a carrier of a contract to deliver goods falls under this Article; *British India S. N. Co. v. Hajee Mahomed*, I. L. R. 3 Mad. 107; *Hassaji v. East Indian Railway Co.*, I. L. R. 5 Mad. 388; *Mohansing Chawan v. Conder*, I. L. R. 7 Bomb. 478; *Danmull v. British India S. Co.*, I. L. R. 12 Calc. 477.

The plaintiff sued the defendant, who had married the plaintiff's deceased brother's widow, to recover by way of compensation the money expended by his family on his marriage; such claim being founded on a custom of the Jats of Ajmere, whereby a member of that community marrying a widow is bound to recoup the expenses incurred by her deceased husband's family on his marriage. It was held that this was a suit for compensation for the breach of an implied contract, and fell under this Article; *Madda v. Sheo Baksh*, *I. L. R.* 3 *All.* 385. The plaintiff was a commissariat agent who purchased goods for Government and was entitled to be paid the amount expended by him on getting his bills passed. More than three years after the last supply of goods by him, and more than three years after he demanded the money due to him, he filed his suit, and it was held that the suit was barred under this Article; *Doya Narain v. The Secretary of State*, *I. L. R.* 14 *Calc.* pp. 275, 276.

Where a judgment-debtor paid a sum of money on account of a decree which was not certified to the Court, and the judgment-creditor subsequently issued execution for the whole amount of the decree, a suit to recover the amount paid on account and damages will fall under this Article; *Ganpat v. Kirparam*, *Panj. Rec.* No. 79 of 1892; if for the money alone, it might fall under Art. 97; *ib.*

To bring a suit under this Article it must be for compensation for a breach of contract not specially provided for by any other article. Therefore, where there has been a breach of contract, but the proper form of suit is for money received to the use of the plaintiff this Article does not apply; *Johuri Mahton v. Thakoor Nath*, *I. L. R.* 5 *Calc.* 830. This case would, however, have fallen more appropriately under Art. 97.

*Successive breaches.*—Where a sum due under a bond is not paid on the day appointed, the fact that it subsequently remains unpaid does not constitute successive breaches; *Mansab Ali v. Gulabchand*, *I. L. R.* 10 *All.* 85; *Golam Abas v. Mahomed Jaffer*, *I. L. R.* 19 *Calc.* 23 (n).

**Art. 116.** *For compensation for the breach of a contract in writing registered; six years from the date when the period of limitation*

would begin to run against a suit brought on a similar contract not registered.

### Notes.

This Article corresponds to Art. 117 of Act IX of 1871, but the description of suit is there given as "on a promise or contract in writing registered."

In cases under the Dekhan Agriculturists' Act, the time under this Article is extended to twelve years; Act XXIII of 1881, Sect. 17.

For cases on the meaning of compensation, see the notes to the previous Article.

*Registration* must be under one of the Registration Acts or Regulations. Attestation before a Cazeer is not registration; *Doyee Moyee v. Nobonee*, 1 W. R. 89.

This Article applies to suits to recover compensation for the breach of any contract in writing which has been registered; such as suits to recover money due on a registered bond; *Gauri Shunker v. Surju*, I. L. R. 3 All. 276; *Husein v. Hafiz*, *ib.* 600; *Khunni v. Nasir-ud-din*, I. L. R. 4 All. 255; *Magaluri v. Narayana*, I. L. R. 3 Mad. 359; *Amritrav v. Vasudev*, P. J. 1882, p. 291; *Nobocoomar v. Siru Mullick*, I. L. R. 6 Calc. 94; *Ganesh Krishn v. Madhavrav Rajeji*, I. L. R. 6 Bomb. 75; *Kalut Ram v. Lala Dhamukdhari*, 11 C. L. R. 361; *Seshayya v. Annamma*, I. L. R. 10 Mad. 100; *Rathnasami v. Subramanya*, I. L. R. 11 Mad. 56; *Ram Baksh v. Maghar Singh*, Panj. Rec. No. 86 of 1881; *Collector of Etawah v. Beti Maharani*, I. L. R. 14 All. 162, whether there is or is not any express provision in this act for similar contracts when unregistered; *Din Dromal v. Gopal Sarun*, I. L. R. 18 Calc. 506, a suit to recover rent reserved by a registered contract; *Vythilinga v. Thetchanamurti*, I. L. R. 3 Mad. 76; *Umesh Chunder v. Adarmoni*, I. L. R. 15 Calc. 221; (in this case there is no mention made of the Bengal Tenancy Act, as to which, see next page). A suit for compensation for land turning out less in quantity than the description given in the registered conveyance, such compensation being provided for by the conveyance itself; *Kishen Lal v. Kinlock*, I. L. R. 3 All. 712; a suit to

recover from the representative of a deceased agent moneys received and alleged to have been misappropriated by him, when the contract for service is registered; *Harender v. Administrator-General*, *I. L. R.* 12 *Calc.* 357.

Where a partnership agreement which provided that each partner should bear a proportionate share of the losses was registered; it was held that one partner could sue another to recover from him his share of loss at any time within six years from the date the loss was sustained; *Ranga v. Chima*, *I. L. R.* 14 *Mad.* 465.

A registered promissory note was subsequently to its registration endorsed, and it was held that the implied contract between the endorser and endorsee arising from such endorsement got no benefit from the fact that the note itself was registered; *Kylasana v. Armugun*, 4 *Mad. H. C. Rep.* 366; besides which, a contract in writing means a writing in which the undertaking of the party sought to be charged is expressed; *ib.*; following *Lakshmanaiyan v. Sivasamy*, *ib.* 216. In the case of *Umedchand v. Sha Bulakidas*, 5 *Bomb. H. C. Rep. O. C. J.* 16, however, the Court thought that the word "Rs. — are duly found to be due to you on account" signed by the debtor was a sufficient contract in writing within the meaning of Act XIV of 1859, Sect. 1, Cl. 9.

A suit for damages by reason of the non-payment of money secured by a registered hypothecation-bond on the date provided therein for the payment thereof falls under this Article, and must be brought within six years from the day when the money was payable; *Bhagwant v. Daryao*, *I. L. R.* 11 *All.* 416. So where there is no stipulation in a deed of conditional sale to pay interest after the day fixed for the repayment of the principal, a claim for interest after such due date is a claim for compensation for a breach of contract and a suit to recover such compensation must be brought within six years from the date of the breach; *Gudri Khoer v. Bhubaneswari*, *I. L. R.* 19 *Calc.* 19; *Golam Abas v. Mahomed Jaffer*, *ib.* 23 (n).

A suit by a mortgagor to recover from the mortgagee the amount expressed in a registered mortgage deed to have been advanced, but which was not paid to the mortgagee, falls under

this Article, and not under Art. 113, and must, in the absence of any specific provision as to the time of payment, be brought within six years of the execution of the mortgage deed; *Naubat Singh v. Indar Singh*, *I. L. R.* 13 *All.* 200.

- ✓ This article applies to a suit against an infant on a registered bond given for necessities, but in such a case it is requisite that the consideration for which the bond is given should be proved, and then the bond becomes a registered contract which binds the infant; *Sham Charan v. Chowdhry Debya*, *I. L. R.* 21 *Calc.* 872.

This Article does not apply to suits for rent under the Bengal Tenancy Act, 1885, reserved in registered documents, as by that Act one period is reserved for all suits for rent, and Sect. 6 of this Act prevents any provision contained in these Articles effecting the time so fixed; *Iswari v. Crowdy*, *I. L. R.* 17 *Calc.* 469 (distinguishing *Vythilinga v. Thetchanamurti*, *I. L. R.* 3 *Mad.* 76; and *Umesh Chunder v. Adarmoni*, *I. L. R.* 15 *Calc.* 221) approved of and confirmed in *Mackenzie v. Haji Syed Mahomed*; *I. L. R.* 19 *Calc.* 1 (*F. B.*).

**Art. 117.** *Upon a foreign judgment as defined in the Code of Civil Procedure; six years from the date of the judgment.*

### Notes.

This Article corresponds to Art. 116 of Act IX of 1871, but in that Act the words in the first column were "upon a judgment obtained in foreign country."

By the Civil Procedure Code, Sect. 2, a foreign judgment is defined as a judgment of a Court situate beyond the limits of British India, and not having authority in British India nor established by the Governor-General in Council. The meaning of the term foreign judgment is well-known; it is the final order of a foreign Court; see, *London B. and M. Bank v. Hormusji Pestonji*, 8 *Bomb. H. C. Rep. O. C. J.* 200; but if the definitions of the Code are carried out to their legitimate extent, it only means under that Act the statement of the grounds of an order or decree made by a foreign Court, which, however, is not what is sued on, but the decree or order.

The foreign judgment must be one which can be sued upon in India. Judgments of Courts in Native States cannot be so sued upon; *Bhavanishankar v. Pursadri Kalidas*, I. L. R. 6 Bomb. 292; followed in *Himmatlal v. Shivajirao*, I. L. R. 8 Bomb. 593; *secus Sama Rayar v. Anamalai*, I. L. R. 7 Mad. 164.

**Art. 118.** *To obtain a declaration that an alleged adoption is invalid, or never in fact took place; six years from the date when the alleged adoption becomes known to the plaintiff.*

**Art. 119.** *To obtain a declaration that an adoption is valid; six years from the date when the rights of the adopted son as such are interfered with.*

### Notes.

These Articles correspond to Art. 129 of Act IX of 1871, but that article applied to suits to establish or set aside an adoption, and the limitation was twelve years from *either* the date of the adoption, *or* the date of the adoptive father's death. It will thus be seen that the period of limitation, the date from which it runs, and the description of the nature of the suit are all changed under the present Act. Whether the alteration of language denotes a change of policy, or how much change of law it effects, are questions which yet have to be determined; *Jagadamba v. Dakhina*, 13 I. A. at p. 94. Under Art. 118 no other date for limitation is possible than the date on which the plaintiff becomes aware of the fact of the alleged adoption; *Ganga Sahai v. Lekhraj Singh*, I. L. R. 9 All. 253.

It was supposed by many of the Judges on the Indian Bench that the Privy Council in *Raj Bahadoor v. Achumbit Lal*, 6 I. A. 110, had ruled that Art. 129 of Act IX of 1871 applied only to suits brought for the express purpose of setting aside or establishing an adoption, and did not bar a suit to establish any other rights, the limitation for which would fall under any other Article, although the validity or invalidity of the adoption might incidentally have to be determined in such suit, and such supposed ruling was followed in *Purna Narain v. Hemokant*, 6 C. L. R. 110; and *Srinivas v. Venkatramana*, I. L. R. 5 Mad. 121. In *Raghubar v. Bhikya Lal*, I. L. R. 12 Calc. 74, however, Field, J.,

pointed out that in the Privy Council case the alleged deed of adoption from its form was innocuous during the widow's life, and that, even after her death, it did not need to be absolutely set aside, but only to have its operation restrained within its proper limits, and remarked that that case would not be an authority in a case in which a document *at once* operated upon rights or property intended to be affected thereby; but that where an instrument or transaction was made or done by authority, and had immediate operation given it so as to affect immoveable property, it was difficult to see how a person, who omitted or neglected to have it set aside within the time allowed for a suit for doing this, could afterwards challenge its operation or effect, and recover property, the title to which it, if valid, operated to transfer, such transfer being further actually carried out. This case was followed in *Mahabir v. Hurrihur*, *I. L. R.* 19 *Calc.* 629. See, also, *Bhai Asa v. Attar Singh*, *Panj. Rec.* No. 56 of 1894. In *Jagadamba v. Dakhina*, 13 *I. A.* 84, the Privy Council have lately commented on the case of *Raj Bahadoor v. Achumbit Lall*, and the Indian interpretations of it on the same lines as *Field, J.*, and at p. 94, in speaking of the same Article of Act IX of 1871, say:—"It seems to their Lordships that the more rational and probable principle to ascribe to an Act whose language admits of it, is the principle of allowing only a moderate time within which such delicate and intricate questions, as those involved in adoptions, shall be brought into dispute, so that it shall strike alike at all suits in which the plaintiff cannot possibly succeed without displacing an apparent adoption by which the defendant is in possession." This line of reasoning is followed in *Hasan v. Nazo*, *I. L. R.* 11 *All.* 456. The case of *Jagadamba v. Dakhina* has been quoted and followed in *Mohesh Narain v. Taruck Nath*, 20 *I. A.* 30; *I. L. R.* 20 *Calc.* 487.

Applying this ruling to Art. 118, wherever a defendant claims land of which he is in possession by virtue of an adoption to the prior owner of the land, it is not sufficient that the suit should be filed within twelve years of the adopted son coming into possession; but as the adoption would have to be declared invalid or never to have taken place, in order that the plaintiff might get



a decree, the suit must be brought within six years of the plaintiff knowing of the adoption. But, if the adoption in form did not give the defendant any right to the land, although he was claiming the land by virtue of the adoption, the suit could be brought within twelve years of the defendant getting into possession of the land adversely to the plaintiff, as it would not be necessary to set aside the adoption, but only to declare that, assuming it to be valid, it had not the effect contended for by the defendant. This decision may work hardship, for a remote reversioner, who at the time of the adoption had no practical hope of succeeding to the property, and therefore no interest in contesting the validity of the adoption, might in the course of years, before the death of the widow, find that he had become the next heir, at a time when he would be too late to file a suit to set aside the adoption and yet be barred from every other remedy, either then or after the death of the widow. This interpretation of *Raj Bahadoor v. Achumbit Lall* will probably affect other cases to which its supposed principles have been applied.

In *Basdeo v. Gopal*, *I. L. R. 8 All. 644*, the High Court at Allahabad have ruled that the judgment of the Privy Council in *Jagadamba v. Dakhina* on Art. 129 of Act IX of 1871 is not applicable to this Article, on the ground that this Article can only apply to a declaratory suit, the sole object of which is to declare the invalidity of an adoption, and that a suit for possession of property to which another limitation law is applicable will be governed by that law, although the question of the validity of the adoption may arise. The Court relied upon some rather vague expressions of opinion of the Privy Council in *8 I. A. pp. 94, 95*, and upon the fact that as the granting of a declaratory decree was in the discretion of the Court, the fact that a person had not sued for a declaration, should not be a bar to a suit for possession. If this interpretation can be upheld, it will do away with the apparent hardship likely to be caused by the Privy Council case, just referred to. The principle of this ruling of the Court in Allahabad has been confirmed by one in Calcutta; *Lala Parbhu v. Mylne*, *I. L. R. 14 Calc. at p. 416*; in which it was held that a suit for a declaratory decree must be brought within six years,

but a suit for possession, although based upon the invalidity of the adoption, may be brought within twelve years from the widow's death; see, also, *Ganga Sahai v. Lekhraj Singh*, I. L. R. 9 All., p. 267; *Padajirav v. Ramrav*, I. L. R. 13 Bomb., p. 165. The Privy Council has, however, lately had under consideration the words of this article, as compared with those of Art. 129 of Act IX of 1871, and on that point the following remark was made:—"It seems to be more than doubtful whether, if these" (*i.e.*, the words of this article) "were the words of the statute applicable to this case, the plaintiff would take any advantage;" *Mohesh Narain v. Taruck Nath*, 20 I. A., p. 37. Although this is not a direct decision on the meaning of this article, yet it is a very strong expression of opinion that it must be interpreted in the same way as the corresponding one of Act IX of 1871 was interpreted in *Jagadamba v. Dakhina*, ante, p. 235.

The fact, that some other form of relief is barred to the plaintiff, is no reason why he should not sue to establish or set aside an adoption if within the time limited by these Articles; *Kalova v. Padapa*, I. L. R. 1 Bomb. 248.

**Art. 120.** *Suit for which no period of limitation is provided elsewhere in this schedule; six years from the time when the right to sue accrues.*

### Notes.

This Article is the same as Art. 118 of Act IX of 1871.

Before applying this Article the Court must be satisfied that no other Article in this schedule is applicable; *Kundun Lal v. Bansi Dhar*, I. L. R. 3 All. 170. The Privy Council has, however, ruled that "This article should be applied unless it is clear that the suit is within some other article." *Mahomed Riasat v. Mussamut Hasin*, 20 I. A. 155.

The following suits have been held to be governed by this Article:—a suit for money paid under decrees for rent which were dependent upon a former decree, which was subsequently reversed by the Privy Council; *Kalichurn Dutt v. Jogesh Chunder*, 2 C. L. R. 354; a suit to recover money paid under a decree which is subsequently superseded, which would not fall under

Art. 61 or 62 as the right to recover does not arise until the supercession; *Narayana v. Narayana*, *I. L. R.* 13 *Mad.* 437. See, also, for a similar case in which a suit was brought to establish a right to attach property; *Krishnan v. Perachan*, *I. L. R.* 15 *Mad.* 382. A suit by the purchaser of property at a Court sale against the person who has received the purchase money to recover it on the ground that the judgment-debtor had no saleable interest in the property falls under this Article; *Nilakanta v. Imamsahib*, *I. L. R.* 16 *Mad.* 361.

A suit for recovery of instalments of profession tax under the provisions of the Towns Improvement Act, 1871; *President of Guntur v. Srikakulapu*, *I. L. R.* 3 *Mad.* 124; a suit on a promissory note payable at any time within six years on demand; *Sanjivi v. Kama Errapa*, *I. L. R.* 6 *Mad.* 290; a suit for compensation for the use and occupation of premises by a defendant who does not stand in the position of tenant to the plaintiff (this was under Act XIV of 1859); *Debnath Roy v. Gudadhur Dey*, 18 *W. R.* 132.

A suit against the Secretary of State for surplus sale-proceeds of an estate sold under Act XI of 1859 for arrears of Government revenue falls under this Article, and limitation runs from the time the plaintiff makes a demand for his share of the surplus receipts; *Secretary of State v. Guru Prashad*, *I. L. R.* 20 *Calc.* 51 (*F. B.*).

A suit against the agent of the representative of a deceased person, against whom a decree had been passed for the conversion of certain goods, to recover from him the proceeds of such goods, which were in his hands as agent; *Gurudas Pyne v. Ram Narain*, 11 *I. A.* 59; *S. C.*, *I. L. R.* 10 *Calc.* 860; followed in *Chand Mal v. Angan Lal*, *I. L. R.* 13 *All.* 368, which was a suit by the assignee of a judgment-creditor to recover monies of the judgment-debtor which had been attached in the hands of his agent by the creditor; see, also, *Muhammed Habibulla v. Safdar Hussain*, *I. L. R.* 7 *All.* 25; a suit by creditors to follow the lands of their debtor in the hands of a purchaser or devisee; *Greender Chunder v. Mackintosh*, *I. L. R.* 4 *Calc.* 897; *S. O.* 4 *C. L. R.* 193.

A suit by the proprietor of a *mohalla* against the purchaser of a house therein, in execution of his own decree for one-quarter of the purchase-money, founding his claim upon an ancient custom obtaining in that *mohalla*; *Kirath Chand v. Ganesh Prasad*, I. L. R. 2 All. 358.

A suit to enforce a right of pre-emption in respect of a conditional sale of a share of an undivided *mahal*; *Nath Prasad v. Ram Paltan*, I. L. R. 4 All. 218; *Rasik Lal v. Gajraj Singh*, *ib.* 414; *Asik Ali v. Mathura Kandu*, I. L. R. 5 All. 187; *Uttam Singh v. Fateh*, *Panj. Rec.* No. 103 of 1885; a suit between two persons to establish in whom the right of pre-emption lies; *Durga v. Haidar Ali*, I. L. R. 7 All. 167; *Mutsada v. Hamira*, *Panj. Rec.* No. 11 of 1893.

A suit to declare the title of the plaintiff to property; *Parvat-singji v. Amarsingji*, *P. J.* 1888, p. 272; *Nathu v. Buta*, *Panj. Rec.* No. 27 of 1881; although the effect of the declaration is to set aside an instrument as against the plaintiff; *Pachmathu v. Chinnappan*, I. L. R. 10 Mad. 213; followed in *Puraken v. Parvathi*, I. L. R. 16 Mad. 138, and *Balakrishna v. Secretary of State*, *ib.* 294; see, also, *Din Dial v. Har Narain*, I. L. R. 16 All. 78. If the defendant is in possession of the property, time will begin to run from the first act of the defendant prejudicial to the defendant's title; *Putteh v. Khurak*, *Panj. Rec.* No. 88 of 1882. Where a mortgage is sought to be declared not to be binding on the plaintiff, time will run from the date on which the mortgage was effected; *Chaith Singh v. Jiwan*, *Panj. Rec.* No. 111 of 1884. A suit to declare that a transaction between the defendant does not affect the plaintiff's rights in the subject matter of the transaction also falls under this Article; *Ram Chand v. Muhammad*, *Panj. Rec.* No. 135 of 1888.

A suit by a reversioner to declare that an alienation by the tenant for life does not bind him falls under this Article; *Mangal v. Buta*, *Panj. Rec.* No. 19 of 1883.

A suit for the declaration of the rights of the plaintiffs as reversionary heirs on the death of the widow is not barred so long as the rights subsist, and they subsist so long as the widow

lives ; and such a suit may be brought within the statutory period from the time when they become entitled to possession or other consequential relief ; *Chukkun Lal v. Lolit Mohan*, *I. L. R.* 20 *Calc.* 906 ; a suit to declare that property in possession of a widow is not liable to be sold in execution of a decree against her must be brought by the presumptive heir within six years from the time when the cause of action accrues, and on the death of the first presumptive heir, a new cause of action in that form does not accrue to the next presumptive heir ; *Chhaganram v. Motigavri*, *I. L. R.* 14 *Bomb.* 512.

A suit to declare the plaintiff to be the daughter of a person deceased would fall under this Article, and limitation will run from the time the defendant denies the plaintiff's status, and not from the death of her father ; *Tukabai v. Vinayak*, *I. L. R.* 15 *Bomb.* 423 ; also a suit for a declaration that the plaintiff is the heir of a deceased person ; *Bajabai v. Krishnarav*, *P. J.*, 1876, p. 252.

Where Government order the forfeiture of a village at a time when they are not authorized by law to forfeit such village, and the plaintiff sues within six years for a declaration that such forfeiture is illegal, his claim is within time under this Article ; *Samaldas v. Secretary of State*, *I. L. R.* 16 *Bomb.* 455.

A suit to oust a *shebait* appointed by nomination from his office must be brought within six years as it falls under this Article ; *Jagan Nath v. Birbhadra*, *I. L. R.* 19 *Calc.* 774.

A suit to rectify a deed would fall under this Article, and could be brought within six years from the time the cause of action arose ; *Advocate General v. Bai Punjabai*, *I. L. R.* 18 *Bomb.*, p. 562.

A suit to establish a personal right to manage, or control the management of an endowment, unless the right of control constitutes an hereditary office, or involves the possession of immovable property ; *Bulwantrav v. Purun Mal*, 10 *I. A.* 96 ; a suit to establish the plaintiff's exclusive right to worship an idol ; *Essan Chunder v. Monmohini*, *I. L. R.* 4 *Calc.* 683 ; a suit against a Municipal Committee to declare the right of the plaintiff to establish a market, and to enjoin their President from interfering

with the plaintiff's right; *per Stuart, C. J.*, in *Birj Mohun v. Collector of Allahabad*, *I. L. R.* 4 *All.* 102; affirmed; *ib.* 339.

A suit to compel a lessee to fill up a tank which he had dug contrary to the terms of his lease; *Kedarnath v. Khetturpaul*, *I. L. R.* 6 *Calc.* 34; a suit to compel a tenant to remove trees planted on land rented to him for agricultural purposes; *Gunesh Das v. Gondour Koormi*, *I. L. R.* 9 *Calc.* 147; a suit for the removal of trees planted in certain waste land of the plaintiff by persons who have no right to plant them; *Mushraf Ali v. Iftikhar Husain*, *I. L. R.* 10 *All.* 634.

A suit by a *cestui que trust* against his trustee, after the trustee had handed over to him the *corpus* of the trust property, for an account of his stewardship and for payment to him of any balance which might be in the trustee's hands falls under this Article; *Saroda Persad v. Brojo Nath*, *I. L. R.* 5 *Calc.* 910; So, too, would a similar suit by a ward against his guardian; *Sher Ali v. Khwaja Muhammad*, *Panj. Rec.* No. 84 of 1891; but a suit for specific sums received by the trustee would fall under Art. 62; *Sarjan v. Charan*, *Panj. Rec.* No. 56 of 1883. A suit against trustees to charge them with interest on sums which it is alleged they ought to have invested falls under this Article; *Advocate-General v. Moulvi Abdul Kadir*, *I. L. R.* 18 *Bom.* 401.

A suit for a perpetual injunction under Sect. 54 of the Specific Relief Act, 1877, would fall under this Article; *Kanakasabai v. Muttu*, *I. L. R.* 13 *Mad.* 445.

A suit to declare the provisions of a will as to moveable property void might fall under this Article; *Kherodmoney v. Doorgamoney*, *I. L. R.* 4 *Calc.* 455; 3 *C. L. R.* 315; so would, in all probability, a suit to establish a resulting or constructive trust in respect of moveable property, or to recover such property from the trustee. A suit to recover as heiress the moveable estate of the deceased falls under this Article; *Mahomed Riasat v. Mussamut Hasin*, 20 *I. A.* 155; *I. L. R.* 21 *Calc.* 157.

A suit by a pawnee for the sale of moveable property pawned with him in order to satisfy the debt due by the defendant would fall under this Article; *Dowlut v. Jiwan*, *Panj. Rec.* No. 116 of 1881.

A suit to recover a sum of money deposited as security for the due performance of the duties of an office, which deposit was liable for all sums of money not accounted for by the holder of the office, is certainly entitled to six years' limitation, if it does not fall under Art. 145, and under this Article limitation would begin to run, not from the time of dismissal from the office, but from the time when the account of charges against the deposit was sent in; *Upendra v. Collector of Rajshahye*, *I. L. R.* 12 *Calc.* 113.

A suit for the apportionment of assessment between co-sharers under a single *patta* does not fall under this Article; but such a suit may be brought so long as their joint liability lasts; *Ananda v. Viyyanna*, *I. L. R.* 15 *Mad.* 492; but a suit by a tenant against his landlords after partition among them, for the apportionment of the rent payable to them, does fall under this Article; *Durga Pershad v. Ghosita*, *I. L. R.* 11 *Calc.* 284.

D died, leaving him surviving a widow and a daughter who was the plaintiff's mother. A decree was obtained against the mother in respect of a debt of D, and D's property was sold in execution of the decree, and possession taken in 1869. The daughter died in 1879, and subsequently thereto the plaintiffs sued for a declaration that the decree was collusive and fraudulent, that the sale was not binding on them, and that they were entitled to the property on the death of the widow; it was held that the cause of action arose in 1869, and that, under this Article, the claim was barred; *Chhaganram v. Motigavri*, *I. L. R.* 14 *Bomb.* 512.

A decree was obtained against a Hindu for a debt due by him, but he died before it could be executed. Thereupon the plaintiff sued the sons to recover the amount of the decree out of their father's property which had survived to them. It was held that the cause of action accrued on the death of the father, and that the suit fell under this Article; *Natasayyan v. Ponnussami*, *I. L. R.* 16 *Mad.* 99; but if, under the decree against the father, the amount decreed was payable by instalments, then the cause of action against the sons accrues as each instalment becomes due; *Ramayya v. Venkataratnam*, *I. L. R.* 17 *Mad.* 122.

**Art. 121.** *To avoid incumbrances or under-tenures in an entire estate sold for arrears of Government revenue, or in a patni-taluq or other saleable tenure sold for arrears of rent; twelve years from the date when the sale becomes final and conclusive.*

### Notes.\*

This Article corresponds to Arts. 119 and 120 of Act IX of 1871, but in that Act in the description of the suit there were the following words—"the estate" or "the *taluk* or tenure being, by virtue of such sale, freed from encumbrances and under-tenures." The alteration in the wording makes this Article applicable to under-tenures which are not avoided by the sale *per se*, but which are by the sale rendered voidable at the option of the purchaser, such as *dar-patni* tenure; on the sale of a *patni* tenure; *Titu v. Moresh Chunder*, I. L. R. 9 Calc. 683.

Under the old law, although claims for resumption or assessment of *lakhiraj* land were barred by the twelve years' rule of limitation, when it appeared that the *lakhiraj* tenure was of older date than 1st December, 1790; *Prankissen v. Debnarain*, 1 Hay, 26; yet an exception was made in favour of the purchaser of an estate sold for arrears of Government revenue, to whom it was open, at any time within twelve years from the date of his purchase, to sue for the assessment or resumption of all lands belonging to the estate, although held under a rent-free tenure from a date prior to 1790; *Syud Mahomed v. Obhoy Ram*, W. R. 1864, p. 212; *Soobboga v. Kali Pershad*, 1 W. R. 218. This exception in favour of an auction purchaser was restricted by Act XIV of 1859, Sect. 1, Cl. 14. In a suit to resume or assess, brought since that Act came into force, a defendant who can prove that he, or those through whom he claims have held the lands, whether established to be veritable *lakhiraj* or not, from before the date of the permanent settlement, was, under that Act, absolutely protected, even from an auction purchaser; *Bhugwan Chunder v. Radha Kristo*, 1 W. R. 248; *Joykissen v. Kristomohan*, 3 W. R. 33; *Romanath v. Sristreedhur*,

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\* For the groundwork of these notes the author is indebted to a veryable *résumé* of the subject by Mr. Thompson in his work on Act XIV of 1859.



6 *W. R.* 58. Under that Act an auction purchaser can sweep away encumbrances created since the decennial settlement. The only advantage which he gains by the character of auction purchases is that he is relieved from the law of limitation, and that he is not conclusively barred by the acts or the omissions of the former *zamindar*, whatever presumptions may arise from the omission to question the tenure by those who preceded him in the *zamindari*; *Kooldeep Narain v. Government of India*, 11 *Ben. L. R.* at p. 73. In such a suit the *onus* would be on the defendant to shew a rent-free possession from the permanent settlement, but it would not, however, be necessary that he should give direct proof of his holding up to the exact date of that settlement. It would be sufficient that he should furnish such evidence as would satisfy the Court that the holding is really of ancient date, and not a mere modern appropriation; *Heera Monce v. Lokenath Mondul*, 2 *W. R.* 135; *Forbes v. Shaik Mean*, 3 *W. R.* 69; *Sham Lall v. Sekunder Khan*, 3 *W. R.* 182; *Odhiranee v. Nobolali Khan*, 5 *W. R.* 191. Act XIV of 1859, however, contained a proviso, which is set out in full under Art. 130, *post*, which is not repeated in this Article nor in the corresponding one of Act IX of 1871, and it would seem as if this *absolute* legislative protection to alleged *lakhiraj* tenures dating prior to 1790 was now withdrawn. As regards purchasers at sales for arrears of Government revenue a suit brought by a person claiming under Government to resume or assess *lakhiraj* lands sold under a title subsequent to 1st December, 1790, must be brought within sixty years of the accrual of the cause of action; and, consequently, if the sixty years had expired before the filing of the suit for resumption, that suit would be barred, although the twelve years provided by this Article had not expired; *Koilash Bashini v. Gokulmoni*, 10 *C. L. R.* 41. Consequently, if a suit to set aside a tenure granted subsequently to 1790 would be barred after sixty years, so would a tenure created prior to that date, and the proof of creation prior to that date would at once stop such a suit.

As regards sales for arrears of rent, other than Government revenue, this Article only provides that a suit to set aside encumbrances and under-tenures shall be filed by the auction-purchaser

within twelve years from the date that his purchase becomes final. Act VIII of 1885 provides for Bengal that certain tenures shall not be avoided by the purchaser, and for other parts of India, other Acts provide in what cases such suits may be brought. Upon the sale of a *patni-taluq* for arrears of the landlord's rent, the purchaser acquires it free from all incumbrances created by the outgoing *patnidar*; *Broja Soondur v. Futick*, 17 *W. R.* 407; *Unnoda v. Mothura*, *I. L. R.* 4 *Calc.* 860.

"*Avoid*" must be intepreted as meaning "to do something in exercise of the right of avoidance," because the words of Ben. Act VIII of 1865, Sect. 16, are unambiguous, and do not merely enable the purchaser to avoid at his option or discretion undertenures, but declare that he obtains the tenure sold free from all incumbrances; *Unnoda v. Mothura*, *ib.*

This Article will also apply to an assignee of a purchaser, who is entitled to the same rights as his assignor, if the transfer follows immediately upon the sale or at a reasonable time thereafter; *Koylash Chunder v. Jubru Ali*, 22 *W. R.* 29.

**Art. 122.** *Upon a judgment obtained in British India, or a recognizance; twelve years from the date of the judgment or recognizance.*

### Notes.

This Article is the same as Art. 121 of Act IX of 1871.

This Article does not enable suits to be brought upon all judgments obtained in British India, but only provides a period of limitation for suits upon such judgments as can be sued upon; see *Jivi v. Ramji*, *I. L. R.* 3 *Bomb.* at p. 209. A decree of the High Court has been held by *Wilson, J.*, to be such a decree; *Attermony v. Hurry Doss*, *I. L. R.* 7 *Calc.* 75; but that was doubted in *Merwanji Nowroji v. Ashabai*, *I. L. R.* 8 *Bomb.* at p. 13. The decree of a Mofussil Small Causes Court cannot be sued on; *Sandes v. Jomir Shaikh*, 9 *W. R.* 399. No suit can now be brought on a decree of a Presidency Small Causes Court; Act XV of 1882, Sect. 94.

Where a decree-holder tries to obtain possession of land to which he is entitled under the decree, and is obstructed, and his

application is, under Sect. 331, Civ. P. C., tried as a suit, this Article is not applicable, but the case falls under Art. 144; *Harihari v. Balaji*, P. J. 1885, p. 196.

A suit cannot be brought on any decree when the execution of such decrees is barred by limitation; *Fakirapa v. Pandurangapa*, I. L. R. 6 Bomb. 7.

Where a decree is made payable by instalments, it becomes a judgment for the purposes of limitation in respect of each instalment on the day when such payment is to be made; *Sakharam Dikshit v. Ganesh Sathe*, I. L. R. 3 Bomb. 193; followed in *Lakshmi Bai v. Madharao*, I. L. R. 12 Bomb. 65.

**Art. 123.** *For a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the property of an intestate; twelve years from the date when the legacy or share becomes payable or deliverable.*

### Notes.

This Article corresponds to Art. 122 of Act IX of 1871, but the words "or for a share of a residue bequeathed by a testator" have been introduced; and before the words "property of an intestate" the word "moveable" has been omitted. The first alteration is a legislative recognition of the decision of *Pontifex, J.*, in *Treepoorasoodery v. Debendronath Tagore*, I. L. R. 2 Calc. 45.

An executor was always in a loose sense held to be a trustee for creditors and legatees, since he held the personal estate for their benefit and not his own, but he cannot be deprived of the benefit of the Statute in any other way than by shewing that he is an express trustee; *Evans v. Moore* (1891), 3 Ch. 119.

This Article applies only to cases in which the property sought to be recovered is a legacy or share of residue, and it is sought to be recovered from the person who lawfully represents the estate of the deceased; *Issur Chunder v. Juggut Chunder*, I. L. R. 9 Calc. 79; approved of in *Keshav v. Narayan*, I. L. R. 14 Bomb. 249; followed in *Haji Faki v. Mahomed*, P. J., 1891, p. 212; see, also, *Kally Churn v. Dukhee*, I. L. R. 5 Calc. 696. A suit against an executor *de son tort* does not fall under this Article; *Sithamma v. Narayana*, I. L. R. 12 Mad. 487. A suit by an

heiress to recover, as such, the moveable property of the deceased does not fall under this Article, but under Art. 120 ; *Mahomed Riasat v. Mussamut Hasin*, 20 *I. A.* 155 ; *I. L. R.* 21 *Calc.* 157.

An executor who has assented to a residuary legacy by signing a residuary account shewing the amount of duty payable does not thereby become a trustee so as to be unable to avail himself of the statutes of limitation ; *Jacob v. Hind*, *W. N.* (1889), p. 74, affirmed an appeal, *ib.* p. 161.

A suit by the representative of a person, whose father had made a specific provision for her by his will to recover the amount of such provision, is a suit for a legacy ; *Prosunno Chunder v. Gyan Chunder*, 13 *W. R.* 354. Where a sum assigned to sons was by the terms of a will to be regarded as a legacy, and not as a charge on the estate for their maintenance, the limitation provided for the recovery of a legacy will apply ; *Nana v. Rama*, 2 *Agra*, 171.

Where the widow of a Mapilla who had died more than fourteen years before suit, sued to recover one-sixteenth of the property left by him and his brother ; it was held that this Article applied, and that the suit was barred ; *Kasmi v. Ayeshamma*, *I. L. R.* 15 *Mad.* 60.

This Article applies also to cases where the claim is for the whole of the residue ; *Kherodemony v. Doorgamony*, 2 *C. L. R.* 118 ; *S. C.* on appeal, *I. L. R.* 4 *Calc.* 455 ; 3 *C. L. R.* 315.

Where the property of a deceased man came into the possession of his widow under a compromise in a suit respecting the family property by which she was to manage the property on behalf of the family, and quarrels having arisen, the sons of the deceased man sued his widow to recover the property ; it was held that this was not a suit for a legacy, or a share of a residue, or a distributive share ; *Kally Churn v. Dukhee*, *I. L. R.* 5 *Calc.* at p. 696.

“Payable or deliverable” means, payable or deliverable by the executor, administrator, or other person in possession of the estate. The words “present right to receive” in England have been held to refer to the time when there is a present right in the legatee

to receive from the executor, &c., and not to the time when there is a right in the executor to receive from a debtor to the estate. *In re Johnson*, 33 W. R. (E.) 502; although in consequence of the non-receipt by the executor the legacy, &c., cannot be paid.

**Art. 124.** *For possession of an hereditary office; twelve years from the date when the defendant takes possession of the office adversely to the plaintiff.*

*Explanation.*—An hereditary office is possessed when the profits thereof are usually received, or (if there are no profits) when the duties thereof are usually performed.

### Notes.

This Article corresponds to Art. 123 of Act IX of 1871, but after the words “when the defendant,” the words “or some person through whom he claims” have been left out, but by Sect. 3, the word “defendant” includes persons through whom he claims.

This Article and the corresponding one of the Act of 1871 take away the necessity of discussing the question which arose under Act XIV of 1859, as to whether an hereditary office is immoveable property, on which point the Courts in Bombay and Madras were somewhat at variance.

This Article only applies when the succession is by inheritance. When the succession is by nomination Art. 120 applies; *Jagan Nath v. Birbhadra*, I. L. R. 19 Cal. 776.

Where the holder of an hereditary office alienates the office, such alienation is valid, ordinarily, for his life-time, and not longer, and the possession of the alienee is not adverse to the heir until the death of the alienor; *Babaji v. Nana*, I. L. R. 1 Bomb. at p. 537; *Muppidi v. Ramuna*, I. L. R. 7 Mad. 85. This, of course, does not apply to cases of alienation of the property attached to an office, where the holder has authority to make such alienation for the purposes of the office, and does so alien it; see, also, the cases under Art. 140.

A suit to assert the plaintiff's personal right, as heir of his father, to manage, or control the management of, the funds of a temple may fall under this Article; *Bulwant Rao v. Puran Mal*, 10

*I. A.* 90; *S. C. I. L. R.* 6 *All.* 1; see, also, *Karimshah v. Nattan Bivi*, *I. L. R.* 7 *Mad.* 417; *Nilakandan Padmanabha*, *I. L. R.* 14 *Mad.* 153. The claim of a *shebait*, who is the descendant of a *thakur*, to have the conduct of his worship and the custody of his image or portrait placed in the right hands would fall under this Article or Article 144, rather than under Art. 49; *Goswami Shri Girdhariji v. Romanlalji*, *I. L. R.* 17 *Calc.* 3 (*P. C.*).

Where two brothers, whose title to the *dharmakarats*hip of a pagoda was somewhat doubtful, performed the duties of the office in succession, and the survivor bequeathed it to his sister and her husband jointly, who, on the death of the survivor, took possession: it was held that this was an act adverse to the rights of the male members of the family, and that limitation began to run against them from the date of taking such possession; *Manally Chuma v. Mangadu*, *I. L. R.* 1 *Mad.* 343.

Where for more than twelve years an hereditary village Mahar has not claimed payment of his dues and has not had his title recognized, his right to claim the office by suit is barred; *Madvala v. Bhagvanta*, 9 *Bomb. H. C. Rep.* 260.

A suit by existing *karnams* to have the appointment of another person as *karnam* jointly with them declared void does not fall under this article, *Lakshminarayanappa v. Venkataratnam*, *I. L. R.* 17 *Mad.* 395.

As to the question which may arise in recovering the past profits of an hereditary office, see the notes to Art. 131.

**Art. 125.** *Suit during the life of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to the possession of land, to have an alienation of such land made by the female declared to be void except for her life or until her re-marriage; twelve years from the date of the alienation.*

### Notes.

This Article corresponds to Art. 124 of Act IX of 1871, but that Article was confined to alienations by Hindu widows, and the person bringing the suit is described as the person "entitled to

the possession of land on her death." The words "or until her re-marriage" have, also, been added.

This Article applies only to suits filed *during the life* of a female for the purpose of obtaining a declaratory decree. If no suit be filed during her life-time, or before she re-marries, by the presumptive heir, then at her death or re-marriage the rights of the real heir come into existence, and the ordinary period of limitation for the kind of property which is sought to be recovered will begin to run from the date of her death or re-marriage; see *Jowala Buksh v. Dharum Singh*, 10 *Moore I. A.* at p. 535; *Pershad Singh v. Chedu Lall*, 15 *W. R.* 1; *Prosommo Nath v. Afzolonissa*, *I. L. R.* 4 *Calc.* 523; *Isri Dutt v. Hansbutti*, *I. L. R.* 10 *Calc.* 324; *S. C.* 10 *I. A.* 160.

**Art. 126.** *By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property; twelve years from the date when the alienee takes possession of the property.*

### Notes.

This Article corresponds to Art. 125 of Act IX of 1871, but, under that Act, limitation ran from "the date of the alienation." This alteration seems to have been made to bring the law into conformity with the cases of *Raja Ram v. Luchman Pershad*, 8 *W. R.* 15; and *Poonheet Kooer v. Kishen Kishore*, 23 *W. R.* 419; in which it was held the plaintiff's cause of action was the taking possession by the defendant of what was the son's joint share of the family property.

Art. 126 of the Act of 1871 which applied to like cases to those provided for by this Article when the parties were governed by the Dayabhaga has been omitted, probably because, limitation running from the death of the father, such a suit would be covered by Art. 144.

**Art. 127.** *By a person excluded from joint family property to enforce a right to share therein; twelve years from the date when the exclusion becomes known to the plaintiff.*

### Notes.

This Article corresponds to Art. 127 of Act IX of 1871, but that Article only applied to Hindus, and limitation ran from the time when the plaintiff claimed and was refused his share. The result of the wording of the old Article was that if a plaintiff never claimed his share, the period within which he might have brought his suit was unlimited; *Kali Kishore v. Dhununjoy*, I. L. R. 3 Calc. 228; consequently, the period of limitation prescribed by this Article is shorter than that prescribed by the former one; *Narain v. Lokenath*, I. L. R. 7 Calc. 461.

Under this Article it is not necessary that the plaintiff should be able to claim a definite share, and enforce partition; all that is necessary is that he should claim to be entitled to share in joint property, although that may be, as under *Aliyasantana* law, indivisible; *Muttakke v. Thimmappa*, I. L. R. 15 Mad. 186.

*Exclusion* implies previous *inclusion*; *Saroda Soondury v. Doyamoyee*, I. L. R. 5 Calc. 938; consequently, this Article only applies to persons who are members of a joint family, and claim a right to share in joint family property upon the ground that they are members of the family, to which the property belongs; *Kartick v. Saroda*, I. L. R. 18 Calc. 642; relying on the principles laid down in *Radanath Doss v. Gisborne*, 14 Moore I. A. 1. It does not apply to persons who claim a right of inheritance through a person who was not a member of a joint family, such as a daughter's son, to whom Arts. 140 and 141 would apply; *Mothura Nath v. Borkant Nath*, 11 C. L. R. 312; nor to a stranger purchasing the share of a member of a joint family; *Ram Lakhi v. Durga Charan*, I. L. R. 11 Calc. 680; followed in *Horendra Chandra v. Aunoardi Mundul*, I. L. R. 14 Calc. 544; and *Muttusami v. Ramakrishna*, I. L. R. 12 Mad. 292.

It also applies only to *joint property of a joint family*; *Saroda Soondury v. Doyamoyee*, I. L. R. 5 Calc. 938; *Thakur Prasad v. Partab*, I. L. R. 6 All. 442; *Obhoy Churn v. Gobind Chunder*, I. L. R. 9 Calc. 237; and not to property which has been partitioned, although not by metes and bounds; *Devapa v. Ganpaya*, P. J. 1877, p. 194. Where joint family property is



actually divided, and one of the co-sharers subsequently deposits money which he has received for his share with another co-sharer, that money is no longer joint family property, and a suit to recover it does not fall under this Article ; *Ahmad Ali v. Husain Ali*, I. L. R. 10 All. 109. Joint family property includes property left by a deceased Mahomedan, and divisible among his heirs, until it is actually divided ; *Sayad Gulam v. Anvarnissa*, P. J. 1885, p. 170 ; following *Khyrunissa v. Salehunissa*, 5 W. R. 238 ; and *Achina v. Ajiyoonissa*, 11 W. R. 45 ; see, also, *Bavasha v. Masumsha*, I. L. R. 14 Bomb. 70 ; followed in *Abdul Rahim v. Kirpuram*, I. L. R. 16 Bomb. 186. The High Court at Allahabad has, however, held that the property referred to in this Article is that of a Joint family, i.e., one, all the members of which hold the whole property jointly, and not property which although it may not have been divided, yet belongs to a family which is not joint, and that this Article does not apply to undivided property of a family governed by Mahomedan law, because each member thereof holds his share in severalty ; *Amme Raham v. Zia Ahmed*, I. L. R. 13 All. 283 (F. B. decision of five Judges). This case was followed, and the Bombay cases dissented from in *Patcha v. Mohidin*, I. L. R. 15 Mad. 57. See, also, *Kasmi v. Ayishamma*, ib. 60 (a case of Mapillas). The High Court of Madras has also since held that the case of Mahomedans who have remained in possession of undivided property, one, on exclusion, asking to have his share delivered to him, falls under Art. 144, and that adverse possession commences from exclusion, or dispossession ; *Abdul Kader v. Aishamina*, I. L. R. 16 Mad. 61.

So long as the plaintiff is in possession of his share no cause of action arises ; *Gosain Doss v. Seroo Roomaree*, 19 W. R. 192 ; *Vidyashankar v. Ganpatram*, P. J. 1875, p. 351 ; nor does a cause of action arise if he is living on the property with the other joint owners, and is supported in the family by the proceeds of the family property ; *Jagapatha v. Ramabhadra*, I. L. R. 11 Mad. p. 392.

Although the possession of one member of a joint family is ordinarily the possession of all the members, yet that principle

will not hold good if there is distinct evidence of the exclusion of any; *Jowala Buksh v. Dharum Singh*, 10 *Moore I. A.* 511; *Vidyashankar v. Ganpatram*, *ubi sup.* Mere absence from joint property does not amount to exclusion; though long absence is an evidentiary fact of great importance in determining whether the absent man is still treated as a member of the family or not; *Govindan v. Chidambara*, 3 *Mad. H. C. Rep.* 99. Where property belonging to the plaintiff and others was entered in their names jointly, and the plaintiff went away and was absent for twenty-one years, taking no part or interest in the property, but returned on learning that a new settlement was being made, and that the defendants had entered the property in their own names; it was held that he was not excluded from possession until the defendants' names alone were entered in the settlement; *Mehr Chand v. Duni Chand*, *Panj. Rec.* No. 18 of 1886. The mere fact that the defendant had been in sole possession of the property for more than fifteen years does not bar the plaintiff's suit, unless that possession was an exclusion of the plaintiff, and was known to be such by him; *Hari v. Maruti*, *I. L. R.* 6 *Bomb.* 741. In the case of a division between two co-sharers in the absence of a third, the fact that they made provision in the deed for his getting his share in the event of his returning, shews that their subsequent possession was not adverse to his right; *Nilo Ramchundra v. Gorind*, *I. L. R.* 10 *Bomb.* 24. So too, where the defendant wrote to the plaintiff requesting him to return and manage his share of the property, or to employ some one to manage it for him, that is evidence that up to that time, the defendant was not claiming the property as his own to the exclusion of the plaintiff, and the mere circumstance that subsequent to this the plaintiff had not participated in the profits, in the absence of other evidence of exclusion, would not justify the inference that the plaintiff was thenceforth excluded; *Dinkar v. Bhikaji*, *I. L. R.* 11 *Bomb.* 365. Where the property of three brothers (one being a minor) was divided among the two who were of age, but the minor continued to live in the house of one or other of his brothers, and on one occasion he was joined as a party to a mortgage of a portion of

the divided property made by a widow of one of his brothers ; it was held that there was no evidence of his having been excluded from enjoyment of the joint property ; *Krishnabai v. Kangowda*, I. L. R. 18 Bomb. 197.

But where family property was divided with the exception of one house, and that house, subsequent to the division, remained in the exclusive possession of the defendant for thirty-five years without any reservation of the rights of the co-parceners, that is cogent evidence from which the exclusion of the plaintiff may be inferred ; *Ramchandra v. Narayan*, I. L. R. 11 Bomb. 216 ; *Tatya v. Anaji*, *ib.* 220 ; *Vithoba v. Narayan*, *ib.* 221 ; *Lachiram v. Uma*, *ib.* 221. The fact that certain members of a joint family separated themselves from the rest, and for many years kept themselves separated from the family, amounts to evidence that they were excluded from that family ; *Muttakke v. Thimmappa*, I. L. R. 15 Mad. 186. Where two brothers sued a third for partition of family property and their suit was dismissed on the ground that the third brother had separated from the family, that does not prove that from the time of such separation the two brothers held the property then in their possession adversely to each other ; *Virupaksh v. Virupaksh*, P. J. 1888, p. 377. Under the Limitation Act, 1859, the fact that, the plaintiff's wife resided in the family house at the expense of the family, is equivalent to a payment of family funds to the plaintiff ; *Kane v. Antaji*, P. J. 1886, p. 315, following *Kazi Ahmed v. Moro*, P. J. 1878, p. 120, and under this Article that would be evidence of non-exclusion of the plaintiff.

Exclusion from *all* ancestral property is not necessary ; all that is necessary is that the plaintiff should have been excluded from that of which he seeks partition ; although there may be other property which, if the defendants sought partition, they might have to bring in ; *Budha Mall v. Bhugwan Das*, Panj. Rec. No. 86 of 1886.

Where a Government allowance which belonged to the whole of a family had been received by one member thereof on behalf of the family and was assigned by that member to his wife who

subsequently to his death refused to acknowledge the rights of the other members : it was held that, supposing the provisions of a statute of limitations were applicable, that a suit to establish the rights of the other members would fall under this Article or Art. 131; *Sahib-un-Nissa v. Hafiza*, *I. L. R.* 9 *All.* 213.

Where an annual allowance, provided by a Will, had been paid to plaintiff by the defendant who was manager under the Will and a son of the testator : it was held that there had been no exclusion of the plaintiff; *Hemangini v. Nobin Chand*, *I. L. R.* 8 *Calc.* at p. 802. But in a subsequent case, however, a payment of a certain sum yearly by one member of a family who was in actual possession to another who was not in possession was held to go some way towards negating joint possession; *Rai Raghunath v. Rai Maharaj*, *I. L. R.* 11 *Calc.* at p. 784 (*P. C.*); *S. C.* 12 *I. A.* 112; this case, however, is not of much use in determining the principles to be applied in such cases, as the judgment turned greatly upon facts which are not fully set out.

Sons who become aware of an attachment against the interest of their father in joint property, by which his under-tenants were restrained from paying rent to him, and under which his rights were subsequently sold, know of their exclusion on the date the attachment becomes known to them; *Issuridutt v. Ibrahim*, *I. L. R.* 8 *Calc.* 653.

**Art. 128.** *By a Hindu for arrears of maintenance; twelve years from the date when the arrears are payable.*

**Art. 129.** *By a Hindu for a declaration of his right to maintenance; twelve years from the date when the right is denied.*

### Notes.

These two Articles cover the ground of Art. 128 of Act IX of 1871, which applied to suits "by a Hindu for maintenance," and limitation ran from the date when "the maintenance sued for was claimed and refused." The result of the alteration is that no more than twelve years' arrears of maintenance can be recovered at any time, and that, irrespective of payment having

been claimed and refused ; and a suit to establish a right to maintenance is never barred so long as it is brought within twelve years of the first denial of the right ; under the Act of 1871, maintenance might have been claimed for any number of years, provided there had been no claim and refusal ; *Jivi v. Ramji*, *I. L. R. 3 Bomb. 207*.

So long as there is no denial of the right, limitation does not run against a suit to establish the right, although there may have been no payment or claim made ; *Ramanamina v. Sambayya*, *I. L. R. 12 Mad. 347*.

The right to maintenance is one accruing from time to time according to the wants and exigencies of the person claiming it (in this case, the widow) ; *Narayanrao v. Ramabai*, *6 I. A. at p. 118* ; *S. C. I. L. R. 3 Bomb. 415*, and *6 C. L. R. 162* ; it is a constantly recurring right ; *Venkopadhyaya v. Kavari*, *2 Mad. H. C. Rep. 36* ; and arrears can be claimed for the time before suit allowed by limitation, although previous years may be barred ; *Jivi v. Ramji*, *I. L. R. 3 Bomb. 207*. Under Art. 128 the fact, that maintenance is payable on a certain day, causes limitation to commence to run from that day, and the absence of a demand of the maintenance and a refusal to pay will not prevent limitation running.

If the right to maintenance is denied, then a suit to establish the right must be brought within twelve years from the denial, or the right will be lost ; but if the right be once established, it cannot be subsequently lost by reason of the amount awarded not being claimed, and the only result of delay is that no more than twelve years of arrears can be recovered ; *Chhaganlal v. Bapubhai*, *I. L. R. 5 Bomb. 68* ; followed in *Gajpat v. Chimman*, *I. L. R. 16 All. 189* ; see, also, *Ahmed Hossein v. Nihal-ud-din*, *I. L. R. 9 Calc. 951* ; *13 C. L. R. 380* ; *10 I. A. 45* ; *Ramnad Zamindar v. Dorasami*, *I. L. R. 7 Mad. at p. 343*.

**Art. 130.** *For the resumption or assessment of rent-free land ; twelve years from the date when the right to resume or assess the land first accrues.*

**Notes.\***

This Article is the same as Art. 130 of Act IX of 1871, but the following proviso contained in that Article has been omitted :—" Provided that no such suit shall be maintained where the land forms part of a permanently settled estate, and has been held rent free from the time of the permanent settlement." The same proviso appeared in Act XIV of 1859, Sect. 1, Cl. 14. Now has this omission in the present Article any practical effect ?

The original Regulations for the decennial settlement of the public revenues of Bengal, Behar, and Orissa, were passed for these provinces respectively on the 18th September 1789, the 25th November 1789, and the 10th February 1790. The revenue assessed upon these provinces by the above Regulations was declared fixed for ever by Reg. I of 1793, passed by the Governor-General in Council on the 1st May with effect from the 22nd March of that year. Before Act XIV of 1859 came in operation, the material question arising on a plea of limitation in a suit to resume or assess *lakhiraj* land was, whether the tenure was in existence as *lakhiraj* prior to the year 1790. The importance of this issue had reference to the provisions of Reg. XIX of 1793, Sect. 10, by which a suit for the assessment or resumption of lands claimed by the plaintiff as part of his *mal* lands was exempted from limitation, if the alleged rent-free tenure was shewn to have been created later than 1st December 1790. It was, however, decided by the Privy Council in the case of *Chandrabullee v. Luckhee Debee*, 5 *W. R. P. C.* 1, that this provision must be taken to have been controlled by the sixty years' rule of limitation enacted in Reg. II. of 1805, Sect. 3, Cl. 3, and that under that clause a zamindar's right to assess or resume *lakhiraj* lands was barred by the defendants' peaceable and undisturbed possession for sixty years, even where such possession was under a grant of later date than 1st December 1790 ; but that must be modified by the condition that such sixty years must be shewn to have

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\* For the groundwork of these notes the author is indebted to a very able *résumé* of the subject by Mr. Thompson in his work on Act XIV of 1859.

expired while that regulation was still operative; *Modho Kooery v. Tekait Ram*, I. L. R. 9 Calc. at p. 416.

In all suits to assess or resume *lakhiraj* lands instituted on or after the 1st January 1862, from which date Act XIV of 1859 came into force, the *nullum tempus* provision of Reg. XIX of 1793, Sect. 10, can have no operation; *Pooroo Chunder v. Khelat Chunder*, 2 W. R. 258. All such suits will be barred unless commenced within twelve years from the time when the plaintiff's title accrued; *Dhunput Singh v. Bhoojah Sahoo*, 4 W. R. 53. The result of these cases is to shew that the proviso in Act XIV of 1859 and Act IX of 1871 was not really necessary after one definite term of limitation was introduced for all suits of this nature, and its omission from the present Act does not in any way alter the law, though it prevents the question arising as to whether it is necessary to prove possession before 1790, or whether the proof of *lakhiraj* possession for more than the time limited by the Act is sufficient. It thus upholds the case of *Brojo Mohun v. Bissonath Kamilla*, 10 W. R. 61, against that of *Ramjeebun v. Pershad Shah*, 7 W. R. 458, in the former of which it was held in 1868 that under the law then in force it was sufficient to prove possession of lands rent-free for more than twelve years before suit; see, also, *Bhoneshun v. Runglall*, 1 W. R. 109; and *Abhoy Churn v. Kally Pershad*, I. L. R. 5 Calc. 949.

All such suits must now be brought within twelve years from the time when the right to assess or resume accrued, *i. e.*, when the defendant began to hold the lands rent-free; *Govind v. Kishen*, 6 W. R. 110; *Seta Rama v. Jagunti*, 3 Mad. H. C. Rep. 67; and what in Act XIV of 1859 is described as "the title of the person claiming the right to resume or of some person under whom he claims," is now more succinctly described as "the right to resume or assess." The plaintiff in 1862 obtained a decree for resumption of land held under an invalid *lakhiraj* title created before 1790, the decree declaring the land liable to assessment. In a suit brought more than twelve years after the decree against the representatives of the defendant in the suit of 1862 to assess the land: it was held that the decree of 1862 did not create the

relationship of landlord and tenant between the parties, and that the suit was therefore barred under this Article; *Nil Komul v. Bir Chunder*, *I. L. R.* 16 *Calc.* 450, n.; followed in *Bir Chunder v. Raj Mohun*, *ib.* 449.

Where the right to resume has run out in the life-time of a father, the right is lost to the son; *Amatoolla v. Nubbee Buksh*, *W. R.* 1864, *Act X*, 132; and when the right to resume has not been exercised within time by the *zamindar*, it cannot be revived in a *patnidar* or *darpatnidar* deriving title from the *zamindar*; *Shib Pershad v. Shaikh Buseeroodheen*, *W. R.* 1864, 170; *Joykissen v. Kristmohun Doss*, 3 *W. R.* 33; and in a suit by a *darpatnidar* to resume lands alleged to be held as *lakhiraj* under an invalid title, limitation will not run from the creation of the *darpatni* title, but from the date of the possession of the person from whom the *patnidar* has derived his title; *Gunga Ram v. Hurree Nath*, 15 *W. R.* 436.

Where a permanent tenure has been granted by a *ghatwal*, if his successor, being one of the *ghatwals* to whom Reg. XXIX of 1814 applies, wishes to resume that tenure, he must file his suit within twelve years after succeeding to the *ghatwali* estate; *Modho Koery v. Tekait Ram*, *I. L. R.* 9 *Calc.* 411; reversed by *P. C.* 12 *I. A.* 188; see the note of the case under Art. 144.

Where a plaintiff claims rent on account of lands as *mal* from a defendant who alleges a *lakhiraj* tenure, no deduction can be made, under Sect. 14 of Act XIV of 1859, from the period of limitation, on account of suits which the plaintiff has fruitlessly brought against the same defendant for rent, or for small portions of the same lands; *Prodhan Gopal v. Bhoop Roy*, 9 *W. R.* 570; nor can the time be deducted during which a former suit for assessment, not brought by the plaintiff, nor by any one through whom he claims, was pending; *Borodakant v. Sookhmoy*, 1 *W. R.* 29. And no such deduction could be made under Sect. 14 of the present Act.

**Art. 131.** *To establish a periodically recurring right; twelve years from the date when the plaintiff is first refused the enjoyment of the right.*



### Notes.

This Article is the same as Art. 131 of Act IX of 1871.

The High Court at Madras has held that this article only applies to suits in which a decree for some consequential relief is sought by virtue of the periodically recurring right, and that if only a declaration of right is sought, the suit will fall under Art. 120; *Balkrishna v. Secretary of State*, *I. L. R.* 16 *Mad.* 295. The article itself, however, contains no provision about *recovering* any thing, but only applies to the *establishment* of a right, and the mere establishment of a right gives rise to a declaratory decree.

A claim to worship an idol for one-sixth of each year falls under this Article; *Eshan Chunder v. Monmohini*, *I. L. R.* 4 *Calc.* 683; so does a claim to worship an idol for forty-five days every year; *Gopeekishen v. Thakoordas*, *I. L. R.* 8 *Calc.* 807. A right to *malikana* is a periodically recurring right, and a suit to enforce it might perhaps fall under this Article; but it also carries with it a right to the property itself, if the parties consent to take a settlement when the proper time comes; and, therefore, it would probably fall more properly under Art. 144; *Gopi Nath v. Bhugwat Pershad*, *I. L. R.* 10 *Calc.* 708; Art. 132, however, seems to meet this case exactly, but it was not referred to at all.

*Refusal of enjoyment.*—The refusal must be of a demand made by or on behalf of the plaintiff, or some one through whom he claims. A mere refraining of the plaintiff to demand the right does not amount to a refusal; *Kamman v. Budh Singh*, *Panj. Rec.* No. 146 of 1882. In 1849, the defendants obtained a decree establishing their right to levy *talukdari* dues from the plaintiffs. Such dues not having been claimed by the defendants, the plaintiffs brought a suit to have it declared that they were not liable to pay them; but it was held, that to maintain this suit, the plaintiffs must prove not merely the absence of a demand, but a demand and refusal twelve years before suit; *Gahna v. Ikhlus Khan*, *Panj. Rec.* No. 154 of 1889.

A general denial of the right of a class to whom the plaintiff belongs in answer to a demand of one of that class who is claiming

adversely to the plaintiff and alleging that he is not included in that class, is not a refusal of the enjoyment of the right to the plaintiff; *Ramnad Zamindar v. Dorasami*, I. L. R. 7 Mad. at p. 343; *Ravji v. Bala*, I. L. R. 15 Bomb. 185. In a suit to recover burial fees, the right to which accrued whenever a corpse was brought for burial, limitation runs from the date of the first refusal of the enjoyment of the right; *Bahar v. Pero*, 24 W. R. 385. Where the plaintiff is one of a family upon the members of which in turn devolves the performance of the duties of an office, it must be shewn that the plaintiff's turn to perform the duties and receive the emoluments of the office occurred within twelve years before the suit was brought, and that he was then refused the enjoyment of his right; *Sinde v. Sinde*, 4 Bomb. H. C. Rep. A. C. J. 51.

A suit to establish a periodically recurring right must be brought within twelve years from the time when the plaintiff is first refused the enjoyment of the right, and if not brought till after that time, not only is the right itself barred, but any cause of action the plaintiff may have to recover arrears which rests on such right is also barred. If a plaintiff recovers in a suit arrears of periodical payments, but, apparently, without a declaration that he has a right to such payments for the future, and then makes no claim for more than twelve years, any subsequent suit for the arrears of such periodical payment would be barred; *Shivram Dinkar v. Secretary of State*, I. L. R. 11 Bomb. at p. 233. If, however, the right has been already established, the plaintiff can, at any time thereafter, bring a suit for arrears for twelve years; *Ohhaganlal v. Bapubhai*, I. L. R. 5 Bomb. 68; followed in *Gajpat v. Chimman*, I. L. R. 16 All. 189; but if the right established be only to share in the sums received by the person against whom the right is established, the limitation would be, three years under Art. 62; *Harmukhgauri v. Harisukhprasad*. I. L. R. 7 Bomb. at p. 193; *Desai Maneklal v. Shivilal*, I. L. R. 8 Bomb. at p. 432; *Dulabh Vahuji v. Bansidharrai*, I. L. R. 9 Bomb. 111; *Ravji v. Bala*, I. L. R. 15 Bomb. 185; but this would still leave the limitation applicable to a *hakdar* suing the person primarily bound to pay him the whole *hak* as laid down in

*Chhaganlal v. Bapubai*, *ubi sup.*, although there the principle was applied to a state of facts to which it was not applicable; see *Ahmad Hossein v. Nihal-ud-din*, *I. L. R.* 9 *Calc.* 945 (*P. C.*). The question as to who is being sued, *i. e.*, whether the person primarily liable or a co-sharer who has received the whole amount, is very often overlooked as it was in *Chhaganlal's* case, and in *Hurmuzi v. Hirdaynarain*, *I. L. R.* 5 *Calc.* 921, where the owner of a seven-anna share of certain *malikana* sued the owner of the nine-anna share who had received the whole amount to recover his proportion, and the Court held that the limitation was twelve years.

Where the right to the revenue of certain land was granted to the trustees of a *mosque*, and the grant confirmed by Government in 1866, but no revenue had ever been paid by the owners of the land, although they did not deny that they were liable to payment to the persons entitled to claim it: it was held that the trustees could recover twelve years of arrears under this Article; *Alubi v. Kunhi*, *I. L. R.* 10 *Mad.* 115; but where the nature of the tenure, and the right of the landlord is denied, and no payment has been made for more than twelve years, the landlord's claim is barred; *Ramchandra v. Jaganmohana*, *I. L. R.* 16 *Mad.* 161.

**Art. 132.** *To enforce payment of money charged upon immoveable property; twelve years from the date when the money sued for becomes due.*

*Explanation.*—The allowance and fees respectively called *malikana* and *haqq*s shall, for the purpose of this clause, be deemed to be money charged upon immoveable property.

### Notes.

This Article is the same as Art. 132 of Act IX of 1871, except that the words "to enforce payment of money" have been substituted "for money."

The charge must be one that is binding; *Kameswar v. Rajkumari*, 19 *I. A.*, p. 237.

*Interest.*—Under this Article, interest, as well as principal, charged upon land for twelve years, can be recovered; *Davani v.*

*Rutana*, I. L. R. 6 *Mad.* 417; following *Lallubhai v. Naran*, I. L. R. 6 *Bom.* 719. Unless otherwise provided for by special contract, the interest of money lent on the security of land is a charge upon that land; *Radha Kishan v. Muhamdu*, *Panj. Rec.* No. 57 of 1888. This Article however, does not permit, in cases where the principal has been due for more than twelve years, and the whole of the interest is in arrears, a suit to redeem on payment of the principal and twelve years' interest; *Kawra v. Bishambhar*, *Panj. Rec.* No. 47 of 1890.

This Article does not interfere with the rule of *damdupat*; consequently, if twelve years' interest amount to more than the principal, no more interest than is equal to the amount of the principal can be recovered; *Hari Mahadaji v. Balambhat*, I. L. R. 9 *Bomb.* 233.

This Article only applies to suits brought by *hakdars* and such like persons *against the person primarily liable to pay the hak* or other allowance, and not to suits by one co-sharer in a *vatan* against another co-sharer who has received the plaintiff's share; *Harmukhgaury v. Hariukhprasad*, I. L. R. 7 *Bomb.* 191; followed in *Maneklal v. Shivalal*, I. L. R. 8 *Bomb.* 426; and *Dulabh Vahuji v. Bansidharrai*, I. L. R. 9 *Bomb.* 111. On this point see, also, the notes to Arts. 131 and 62. The explanation to the Article renders it unnecessary to discuss the question, whether a *hak* is an interest in immoveable property, although it be not actually charged upon land or revenue of land, which arose in *Bharat Sangji v. Navanidharaya*, 1 *Bomb. H. C. Rep. A. C. J.* 186; *Maharana Fattessangji v. Kallianraji*, 1 *I. A.* 34, *S. C.* 10 *Bomb. H. C. Rep.* 281; and *Raiji Manor v. Kallianrai*, 6 *Bomb. H. C. Rep. A. C. J.* 56.

Leaving out of the question *malikana* and *haks*, which seem to be specially provided for by the explanation to this Article, the Privy Council have held that this Article applies only to *suits brought for money charged upon immoveable property for the purpose of recovering it out of the property so charged*; *Ramdin v. Kalka Pershad*, 12 *I. A.* 12; *S. C.*, I. L. R. 7 *All.* 502, on appeal from the High Court at Allahabad, in which the Privy Council have

decided, under Act IX of 1871, that "great inconveniences and inconsistencies would arise if they did not read Art. 132 as having reference only to suits for money charged on immoveable property to raise it out of that property. That seems to their Lordships what the Legislature intended." And "that the law of limitation which says a bond for money must be enforced within a certain date" (three years) "applies to the specific demand here for a personal remedy against the defendant." In regard to this decision, it may be remarked that this Article applies to suits to enforce generally payments of money charged upon immoveable property, and is not *in words* limited to the enforcement of payment out of the land itself; and further that it applies to all *haks* and yet some *haks*, not being charged upon immoveable property, it would be impossible to enforce the payment of them out of immoveable property upon which they are not charged. This case, too, is in a very unsatisfactory condition, for, from the fact that no cases are referred to in the judgment, it would appear as if none were cited in the argument, and that the Privy Council consequently were not aware of the current of decisions in India; further the Court pass very lightly over the fact that, under Art. 116, registered contracts have assigned to them a limitation of six years, simply speaking of that class of obligation as "some compound registered securities," and would almost seem to rule that the personal covenant in a mortgage deed, which in this case must have been registered, would be governed by the three years' limitation, though, on looking at the report of the case in the Allahabad reports, it seems to have been admitted in the lower Court that six years was the shortest period of limitation which could be applied.

This decision of the Privy Council, in so far as it rules that this Article applies only to cases in which the payment is to be enforced out of the land on which it is charged, has been followed by the High Court in Calcutta, in a case under the present Article; *Miller v. Runga Nath*, *I. L. R.* 12 *Calc.* at p. 395; and by the High Court at Madras in *Seshayya v. Ammama*, *I. L. R.* 10 *Mad.* 100; and *Rathna v. Subramanya*, *I. L. R.* 11 *Mad.* 56; *Devi Das v. Ishur Das*, *Panj. Rec.* No. 55 of 1884; and the result is that

the law in India on this point now differs from that in England ; for under English law the limitation of twelve years imposed by the Real Property Limitation Act, 1874, Sect. 8, has been held to apply equally to actions and suits for the recovery of money charged upon land, by a personal remedy against the mortgagor on his covenant, as by the remedy against the land ; *Sutton v. Sutton*, 22 Ch. D. 511 ; followed in *Fearnside v. Flint*, *ib.* 579.

In the case of *Seshayya v. Ammama*, *ubi supra*, it seems to be doubtful from the judgment whether the Court was of opinion that six years or three years was the period of limitation for a personal decree on a registered mortgage ; but in the case of *Rathna v. Subramanya*, *ubi supra*, they held that Art. 116 applied to such a case. In Bombay, however, *Jardine and Candy, JJ.*, seem to have overlooked Art. 116, and on the supposed authority of the case in the Privy Council, ruled that the limitation for the personal remedy in respect of money secured by a registered instrument is three years ; *Bulakhi v. Tukarambhat*, *I. L. R.* 14 *Bomb.* 380. It will, however, be seen that the remarks of the Privy Council about this three years' limitation are *obiter dicta* ; they were not necessary for the decision, as the sole question was whether the limitation was twelve years or not, it having been conceded in the Court at Allahabad, as before mentioned, that the plaintiff had six years in which to bring his suit ; whilst he had not brought his suit until after the lapse of ten years after the money secured had become due. In *Rameswar v. Rajkumari*, 19 *I. A.* at p. 236 ; *I. L. R.* 20 *Cal.* 79 ; the Privy Council have since held that the limitation for a personal decree on a registered bond is six years. In the cases of *Dulanbi v. Sakhamam*, *P. J.* 1886, p. 112 ; and *Gungabai v. Venkaji*, *ib.* p. 169 : the High Court held that the limitation for the recovery of mortgage money by a personal decree was three years, but these were cases of unregistered mortgages. In the case of *Shaik Idrus v. Abdul Rahiman*, *I. L. R.* 16 *Bomb.* 303 ; this point did not arise, as the suit for a personal decree was brought only two years after the time when the Court held the cause of action arose.

This case of *Ramdin v. Kalka Persad* has overruled a long series of cases in India in which it was ruled that, where money had

been charged upon immoveable property, a suit to recover the amount due by a personal decree could be brought within twelve years of the money having become due. Although overruled, it may be useful to collect these cases here. In Bombay it was held that a suit by a mortgagee to recover, by a personal decree against the mortgagor, the amount secured by the mortgage, was a suit to enforce payment of money charged upon land, and might be brought within twelve years from the time when the money became due; *Lallubhai v. Naran*, I. L. R. 6 Bomb. 719 (F.B.), overruling *Pestonji Bezonji v. Abdool Rahiman*, I. L. R. 5 Bomb. 463; and followed in *Narayan Bhagwan v. Rajaram Haibatrav*, P. J. 1883, p. 23. That case was followed in Madras in *Davani v. Rutna*, I. L. R. 6 Mad. 417, and *Aliba v. Nanu*, I. L. R. 9 Mad. 218, but dissented from in Allahabad in *Raghubar v. Lachmin*, I. L. R. 5 All. 461; and *Shiv Lal v. Ganga Prasad*, I. L. R. 6 All. 551. In the case of *Muhammad Zaki v. Chatku*, I. L. R. 7 All. 120, however, the Court subsequently approved of the case of *Lallubhai v. Naran*, and held that, where a loan was secured by a usufructuary mortgage of the borrower's entire right and share of certain property, and the lender, having been ejected from the property before the debt was paid off, sued to recover the balance of the debt from the general estate of the borrower in the hands of his heirs, the defendants, this Article applied, as the money sought to be recovered was money charged upon land. Thus three of the High Courts in India had agreed in allowing suits for personal decrees for money charged upon land to be brought within twelve years, but none of the cases apparently were cited to the Privy Council in the case of *Ramdin v. Kalka Persad*. The High Court at Calcutta does not seem to have had the point before them before the decision of this case.

*Money charged upon immoveable property.*—This Article only applies to suits brought by persons who have a charge upon immoveable property not amounting to a mortgage, i.e., where the person having the charge has not an interest in the land such as a mortgagee has, and who has no power of sale until he has obtained a decree against the land; *Khemji Bhagvandas v. Rama*, I. L. R. 10 Bomb. 519; *Rangasami v. Muttukumanarappa*, I. L. R. 10 Mad.

509 (*F. B.*); in fact to cases in which the remedy is not by foreclosure or sale in the alternative; *Girwar Singh v. Thakar Narain*, *I. L. R.* 14 *Calc.* 730 (*F. B.*); *Rangasami v. Muttukumarappa*, *ubi supra*. A suit on a simple mortgage to recover the principal and interest secured thereby on the land falls under this Article, and not under Art. 147; *Ram Suran v. Mehtab*, *Panj. Rec.* No. 112 of 1890 (*F. B.*).

Where a person has a power of sale, although only implied, the case will fall under Art. 147; *Govind v. Kaluak*, *I. L. R.* 10 *Bomb.* 592. While the principle laid down in *Khemji Bhugvandas v. Rama* has not been altered, the particular application of that principle to a simple mortgage, as it is called in the Transfer of Property Act, has been overruled in *Motiram v. Vitai*, *I. L. R.* 13 *Bomb.* 90 (*F. B.*); and the Court in *Venkatesh v. Narayan*, *I. L. R.* 15 *Bomb.* 183, while following *Motiram v. Vitai*, refused to express any opinion whether the principle laid down in *Khemji Bhagvandas v. Rama* was the correct interpretation of the Transfer of Property Act. On this point, however, see the notes under Art. 147. A suit by the purchaser of the rights of a mortgagee to bring the mortgaged property to sale under a simple mortgage will fall under Art. 147, and not under this Article; *Brojo Lal v. Gour Charan*, *I. L. R.* 12 *Calc.* 111.

Where a mortgagee under a conditional sale in which no time for repayment was mentioned, had failed to get a valid decree for foreclosure, and sued for possession of the mortgaged property more than twelve years after the date of the deed and more than twelve years after the last payment of interest; it was held that his suit was barred by this Article; *Nilcomal v. Kamini*, *I. L. R.* 20 *Calc.* 269.

*Other cases of charges.*—Where a will recited that the father of the appellant had lent the testator Rs. 15,000, and devised certain specific immoveable property to the appellant with directions to repay therefrom the debt with interest, it was held that this was a charge upon the devised property, and that a suit to recover the money out of the land fell under this Article; *Girishchunder v. Rani Anundmoyee*, 14 *I. A.* 137; *S. C.*, *I. L. R.* 15 *Calc.* 66. Where a testator charged all his real estate with



payment of his debts, it was held that a claim against the testator's estate on a simple contract debt would not be barred for twelve years; *Warburton v. Stephens*, 43 Ch. D. 39.

Where a person possessed of immoveable property borrowed money, and by a writing pledged all his wealth and property to the lender to secure repayment of the amount borrowed, it was held that this was money charged upon immoveable property, although the property was not described in the writing; *Ramsidh v. Balgovind*, I. L. R. 9 All. 158. Where the owner of two villages sold under a decree upon a mortgage which included other villages, sues the owners of the other villages to obtain contribution from them, the suit falls under this Article, and can be brought within twelve years from the confirmation of the sale; *Ibn Husain v. Ramdai*, I. L. R. 12 All. 110.

A document which does not create an immediate charge upon land, but only provides that, in the event of a certain sum of money remaining unpaid after a certain date, the lender shall then be entitled to take possession of the land, is not a mortgage, nor does it create a charge under Sect. 100 of the Transfer of Property Act; *Madho Masser v. Silh Binnik*, I. L. R. 14 Calc. 687. It would seem, however, that this suit ought to have been framed for possession of the land as on the breach of a condition, and then the limitation would have been twelve years from the breach under Art. 143; or else to carry out the terms of an award which had been made in the matter.

Government revenue paid by a co-sharer in a *taluk* in respect of the share of another in order to save the estate from being sold, is a charge upon that share; *Enayet v. Muddun Monee*, 22 W. R. 411; 14 Ben. L. R. 155; dissented from in *Kristo Mohines v. Kali Prosunno*, I. L. R. 8 Calc. 402; but approved of in *Nobin Chunder v. Rup Lall*, I. L. R. 9 Calc. 377; and approved of in *Achut Ramchundra v. Hari Kamti*, I. L. R. 11 Bomb. 313; but overruled by *Kinu Ramdas v. Mozuffer Hosain*, I. L. R. 14 Calc. 809 (F. B.); which was followed in *Khub Lal v. Pubmanund*, I. L. R. 15 Calc. 542; and *Seth Chitor v. Shib Lal*, I. L. R. 14 All. 273 (F. B.); but dissented from in *Seshagiri v. Pichu*, I. L. R. 11 Mad. 452; but

where a person, excluding others who are subsequently declared to be co-owners, pays Government revenue on the whole estate, he gets no lien on the property for the proportion which would have been paid by the co-sharers if they had not been excluded, but must bring his suit for contribution within three years; *Achut Ramchandra v. Hari Kamti*, *ubi supra*; *Sheik Hassan v. Balaji*, *P. J.* 1886, p. 268. Where two persons held two permanent *ijara* villages under one *patta* on which a certain sum was paid annually to the *mittadar*, and one of them paid the whole amount; it was held that he had no charge on the share of the other for half the amount paid by him, but that the case fell under Art. 99; *Thanikachella v. Sudachella*, *I. L. R.* 15 *Mad.* 258. Government revenue paid by a mortgagee is a charge; *Nugender Chunder v. Sreemutty* 11 *Moore, I. A.* 241; *Mohesh Chunder v. Ram Prosumo*, 6 *C. L. R.* 28; *Shaik Idrus v. Vithul*, *P. J.* 1879, p. 407; *Achut Ramchandra v. Hari Kamti*, *I. L. R.* 11 *Bomb.* p. 318; or by a lessee; *Ram Dutt v. Horakh Narain*, *I. L. R.* 6 *Calc.* 549.

Unpaid purchase-money is a charge on the property in possession of the vendee, and a suit to enforce it falls under this article; *Virchand v. Kumaji*, *I. L. R.* 18 *Bomb.* 48.

A suit by a zamindar to recover one-fourth of the sale-proceeds of a house when sold, under an ancient custom, does not fall under this Article; *Kirath Chand v. Ganesh Prasad*, *I. L. R.* 2 *All.* 358.

Where A and B were jointly entitled to land out of which *malikana* was payable to C, payment by A to C of *malikana* within twelve years would save limitation in a suit against A and B; *Nursingh Narain v. Ameerun*, 22 *W. R.* 551.

*Immoveable Property.*—Although *haks* and *malikana* are under this Article to be deemed to be charged upon immoveable property, the question as to what is immoveable property may still arise where money borrowed is charged upon certain offices. The principal cases on the subject will, therefore, be shortly reviewed. In *Krishnabhat v. Kapubhat*, 6 *Bomb. H. C. Rep. A. C. J.* 137, it was held that, in suits between Hindus, “immoveable property” ought to include whatever in the Hindu law is understood to be such; and this decision was confirmed by a Full Bench in *Balvant-*

*rav v. Purshotum*, 9 *Bomb. H. C. Rep.* 99, in which *Westropp*, C. J., fully discussed the whole question. In this case the plaintiffs claimed as mortgagees of an eight-anna share in the office of village *joshi*; and lately the High Court at Calcutta has held that the right to officiate as priest at funeral ceremonies of Hindus is in the nature of immoveable property; *Raghoo Pandey v. Kassy Parey*, I. L. R. 10 *Calc.* 73. Subsequently to the case of *Balvantrav v. Purshotum*, the Privy Council expressed a doubt whether a *palki hak* granted to the *desai* of Broach was immoveable property, although it was payable out of the revenues of a particular *pargunna*, because it did not constitute a charge which could be enforced against the land or against the revenues of the land prior to the claim of Government; *Government of Bombay v. Kallianrai*, 14 *Moore I. A.* at pp. 563, 564. After this decision of the Privy Council, a Division Court in Bombay ruled that a grant to a foreign temple was not immoveable property, because the allowance was not incidental to an hereditary office, nor a charge upon immoveable property, nor supported by a grant from the present or former Government; *Government of Bombay v. Gosvami Girdharlalji*, 9 *Bomb. H. C. Rep.* at p. 228. In *Maharana Fatesangji v. Desai Kallianrai*, 10 *Bomb. H. C. Rep.* 281, the Privy Council said that they saw no objection to the application of the rule laid down in *Krishnabhat v. Kapubhat* within proper limits, *i. e.*, where the nature and quality of the subject of the suit can only be determined by Hindu law and usage, but that in cases where an allowance or office can be held by persons of any religion, the question must be determined by the nature of the thing sued for, and not by the *status*, character or religion of the parties to the suit; and that the term "immoveable property," in India, comprehended all that would be real property in England and something more. Commenting on this case in *Collector of Thana v. Krishnanath*, I. L. R. 5 *Bomb.* at p. 332, *Sargent, J.*, held that in order to property being immoveable property, it must be held in perpetuity and the fund out of which it is to be paid must also be permanent, or, as the Privy Council put it (10 *Bomb. H. C. Rep.* at p. 291), the enjoyment must be hereditary, and the liability to make the payment *virtute tenuræ*. In this case, how-

ever, *Melville, J.*, differed from *Sargent, J.*, but the judgment of the latter was upheld in appeal by a Full Bench; *I. L. R. 6 Bomb. 546*; *sub nom., Collector of Thana v. Hari Sitaram*. See, also, *Beema v. Jamasjee*, 2 *Moore I. A. 23*; *S. C. 5 W. R. P. O. 121*. From these cases, I think it may be laid down that immoveable property under this Act includes everything which under English law is real property, and further, all rights to fees or allowances which are claimable in perpetuity, *i. e.*, by a man or body of men and his or their heirs or successors in office, and which fees or allowances are payable by some one *virtute tenuræ*, *i. e.*, by reason of his holding certain land or being a member of a certain community; and further, that when a right claimed is one peculiar to Hindu law, or which can only be claimed by a Hindu, then the question whether such a right be immoveable property is to be determined by the rules of Hindu law.

Money charged upon *Jaghir* income is money charged upon immoveable property; *Ram Pershad v. Kishen*, *Panj. Rec. No. 4 of 1894*.

A right to a ferry is immoveable property; *Krishna v. Akilanda*, *I. L. R. 13 Mad. 54*. This case was not referred to in *Nityahari v. Dunne*, *I. L. R. 18 Calc. p. 664*, where the question was mooted, but not decided. The office of *karnam* or village accountant is not immoveable property, although land may be attached to the office; *Tammirazu v. Pantina*, 6 *Mad. H. C. Rep. 301*; *Venkata Subbaramayya v. Surayya*, *I. L. R. 2 Mad. 283*.

**Art. 133.** *To recover moveable property conveyed or bequeathed in trust, deposited or pawned, and afterwards bought from the trustee, depositary or pawnee for a valuable consideration; twelve years from the date of the purchase.*

**Art. 134.** *To recover possession of immoveable property conveyed or bequeathed in trust or mortgaged and afterwards purchased from the trustee or mortgagee for a valuable consideration; twelve years from the date of the purchase.*

### Notes.

These two Articles correspond to Arts. 133 and 134 of Act IX of 1871, but in both the words "or bequeathed" have been

inserted, and the words "for a valuable consideration" have been substituted for the words "in good faith, and for value." The result of the latter change is that all purchases for a valuable consideration come under its operation, whether made in good faith or not; while only purchases in good faith came under the operation of the corresponding Article of Act IX of 1871, and a purchase from a mortgagee, not in good faith, would, when the mortgagor was trying to recover the land, have fallen under Art. 148; *Baiva Khan v. Bhiku Sazba*, I. L. R. 9 Bomb. 475; followed in *Vishnu v. Balaji*, I. L. R. 12 Bomb. 352. See, also, the notes on this question, *ante*, p. 55. The Allahabad Court, in *Bhagwan Sahai v. Bhagwan Din*, I. L. R. 9 All. 97, seem to think that the omission of the words "in good faith" does not make any difference in the construction to be placed on this Article as compared with Sect. 5 of Act XIV of 1859; but it appears from the last report of the Special Committee to which the Act of 1877 was referred (see Vol. XIV, p. 466, of *Proceedings of the Legislative Council*) that the words "*bond fide*" were advisedly omitted, to exclude the possible inference that absence of notice of the limited title of the vendor was necessary to enable the purchaser to avail himself of this Article; *Yesu v. Balkrishna*, I. L. R. 15 Bomb. 583; *Pandu v. Vithu*, P. J. 1894, p. 18. The decree in the Allahabad case may, however, possibly be sustained on the ground that what was purchased was only the interest of a mortgagee. The purchaser must be a person who purchases what is *de facto* a mortgage, upon the representation made to him, and in the belief that it is an absolute title; *Pandu v. Vithu*, P. J. 1894, p. 18; following *Radanath v. Gisborne*, 14 Moore I. A. 1.

Under Act IX of 1871, the words "conveyed in trust" were held to be equivalent to "vested in trust" used in Sect. 10 of that Act, and to include "devised in trust"; *Maniklal v. Manchershah*, I. L. R. 1 Bomb. 269.

**Article 134.** This Article applies to cases where the property itself has been purchased from the mortgagee as if he had the full title thereto, not to cases where the mortgage has been assigned, or the interest of the mortgagee only has been purchased; *Radhanath Das v. Gisborne*, 14 Moore I. A. 1; *Bhagwan*

*Sahai v. Bhagwan Din*, I. L. R. 9 All. 97; *Muthu v. Kambalinga*, I. L. R. 12 Mad. 316; *Yesu v. Balkrishna*, P. J. 1891, p. 8; *Savla-ram v. Genu*, I L. R. 18 Bomb. 387, *Pandu v. Vithu*, P. J. 1894, p. 18; nor to a case where an unauthorized person has paid off a mortgage and entered into possession; *Azim v. Muhammad*, Panj. Rec. No. 124 of 1883; but it applies equally to a sale by private contract, and to an auction sale by a Court of the mortgaged property as the family property of the debtors; *Muthu v. Kambalinga*, *ubi supra*. A mortgagee of property is a "purchaser" within the meaning of this Article; *Yesu v. Balkrishna*, I. L. R. 15 Bomb. 588. This Article will not allow a suit to be brought within twelve years of a sale by a mortgagee, by a mortgagor who has allowed upwards of sixty years to pass without taking any steps to redeem the mortgage, *Ram Dhun v. Guneshee*, 16 W. R. 96.

Land belonging to A and B was mortgaged. The descendants of A redeemed the mortgage, and sold the land to C. The descendants of B sold their moiety of the land to D. On a suit by D to recover his moiety by partition, it was held that the redemption by the descendants of A did not constitute them trustees of one moiety of the land for the descendants of B, and they were not persons to whom the land had been conveyed in trust, consequently Art. 134 did not apply; *Datto v. Narsingh*, P. J. 1894, p. 149; followed in *Bhau v. Kondi*, *ib.*, p. 165.

Where a person was in possession for a life estate of certain property for a certain purpose, and her rights therein were sold in execution of a decree against her, it was held that the purchase at such sale, as between the purchaser and the person entitled to the property on the death of the tenant for life, did not fall under Art. 134; *Kali Das v. Kanhya Lal*, 11 I. A. at p. 229; S. C., I. L. R. 11 Calc. 121.

**Art. 135.** *Suit instituted in a Court not established by Royal Charter by a mortgagee for possession of immoveable property mortgaged; twelve years from the date when the mortgagor's right to possession determines.*

### Notes.

This Article corresponds to Art. 135 of Act IX of 1871, but in that Act limitation runs from the time "when the mortgagee is first entitled to possession." One Division Court in Calcutta seemed to think that this change in the wording of the Article has made a great change in the time from which limitation is to run. In *Ghinarain v. Ram Monaruth*, *I. L. R. 6 Calc. 566 n.*; *S. C. 7 C. L. R. 580*, it is remarked that the provision in Act IX of 1871 "was a very unfortunate provision and it has been corrected by the Act of 1877." It is difficult to see what the correction is, for when the mortgagee first becomes entitled to possession, the right of the mortgagor to possession ceases and he can be ejected; and while the mortgagor has a right to possession the mortgagee is not entitled to possession. This question has nothing to do with the right of redemption or foreclosure; the mortgagor has a right to redeem, and the mortgagee to foreclose within the proper time, whether they be in or out of possession; nor has it anything to do with particular laws which may fix particular times at which the right of possession shall pass from the mortgagor and vest in the mortgagee. It is unfortunate that *Pontifex* and *McDonell, JJ.* did not point out in what way the former was "a very unfortunate provision" and how it has been "corrected," for we find that in two cases under the present Article two other Division Courts at Calcutta have treated the terms "when the mortgagee is first entitled to possession" and "when the mortgagor's right to possession determines" as practically synonymous. In *Modun Mohun v. Ashad Ally*, *I. L. R. 10 Calc. 68*, the Court consisted of *Garth, C. J.*, and *Macpherson, J.*, and in *Shurno Moyee v. Srinath Das*, *I. L. R. 12 Calc. 614*, of *Pigot* and *O'Kinealy, JJ.*; and in the latter case, at p. 619, referring to a decision under the old Act, it is stated that the date of default was the time from which the limitation ran, and at p. 620, under the present Article that the date of default is the time from which limitation runs. The decision in the latter case was affirmed by the Privy Council *sub nom.*, *Srinath Das v. Khetter Mohun*, 16 *I. A. 85*. *Mr. Mitra* in his work on limitation seems, however, to think that the "amendment" was intended to meet the case of the mortgagor and

mortgagee agreeing to go on upon the footing of the mortgage after the mortgage term has expired," giving as his authority the final report of the Select Committee on the Limitation Bill, dated 13th June 1877; but the present Article makes no change whatever if the matter be looked into. If the mortgagor and mortgagee, before the date when possession is due, agree to extend that date, then the mortgagee is first entitled to possession, and the mortgagor's right to possession determines at the expiration of the extended time, not, however, under the original mortgage, but under the new contract which has taken the place of the old one. If the date when possession was due has passed, the mortgagee was first entitled to possession and the mortgagor's right to possession determined on that date, and under both Articles limitation in a suit based on the original mortgage will run from the due date. If, however, after that date an extension of time be given by a valid contract, then there will arise a new period of limitation in respect of the *new contract* which has been substituted for the old one. The misapprehension has arisen from not appreciating the fact that an agreement to extend the time is a new mortgage in the same terms as the old, but with the date changed. The understanding between the parties must amount to a valid contract: a mere permission or sufferance will not suffice.

Where a mortgage deed by its express terms allows the mortgagee a right to take possession upon default by the mortgagor in payment of the mortgage money, the mortgagee has twelve years from the date on which default is made within which to bring his suit for possession; *Modun Mohun v. Ashad Ally*, I. L. R. 10 Calc. 63; *Shurno Moyee v. Srinath Das*, I. L. R. 12 Calc. 614; but where there is no such provision in the mortgage, the right of the mortgagee to take possession does not accrue in Bengal until after the expiration of the year of grace provided by Reg. XVII of 1860; *Burmoyee v. Dinobhundo*, I. L. R. 6 Calc. 564; approved of in *Modun Mohun v. Ashad Ally*, *ubi sup.* In the case of *Shurno Moyee v. Srinath Das* all the cases on the subject will be found cited and discussed.



Where a mortgage deed recites that the mortgagor has been put into possession but that is not done, the mortgagee may sue for possession within twelve years from the date of the deed; *Ram Chand v. Gyan Chand, Panj. Rec.* No. 134 of 1883; but if the mortgagor remains in possession more than twelve years, the mortgagee is barred under this Article, even though he may have so remained with the permission of the mortgagor; *Lal Mohun v. Prosunno*, 24 *W. R.* 433; *Modun Mohun v. Ashad Ally, ubi sup.* The fact that an Act passed subsequent to the expiry of the twelve years gave the right of foreclosure does not affect the right of parties already acquired or lost under this Article; *Srinath Das v. Khetter Mohun*, 16 *I. A.* 85; *I. L. R.* 16 *Calc.* 693.

If, however, the mortgagee within the twelve years completes foreclosure proceedings in the District Court, he has a new period of limitation for recovery of possession, not as mortgagee, but as absolute owner; *Ghinarain v. Ram Monaruth*, 7 *C. L. R.* 580; *Burmoyee v. Dinobhundo, ubi sup.*; *Modun Mohun v. Ashad Ally, ubi sup.* An order of foreclosure absolute vests the ownership and beneficial title to the land for the first time in the mortgagee, and thenceforward a new period of limitation runs against him in respect of a suit for possession; *Heath v. Pugh*, 6 *Q. B. D.* 345; affirmed 7 *App. Ca.* 235. If the mortgagee institutes foreclosure proceedings against the mortgagee only and not against grantees from him of portions of the mortgaged property, he still remains, *quoad* those grantees, mortgagee and his *status* is not changed to that of owner; *Srinath Das v. Khetter Mohun*, 16 *I. A.* 85; *I. L. R.* 16 *Calc.* 693.

Where a second mortgagee was put in possession of the mortgaged property on default being made by the mortgagor, but was dispossessed by a decree in favour of the first mortgagee, who was, however, subsequently paid off, it was held that the second mortgagee was entitled to possession from the date of the prior mortgagee being paid off and the representatives of the mortgagor coming into possession; *Narain v. Shimbhoo, I. L. R.* 1 *All.* 325 (*P. C.*).

A suit for possession under a usufructuary mortgage falls under this Article; *Shib Lal v. Ganga Prasad, I. L. R.* 6 *All.* 559.

Where a mortgagor makes a usufructuary mortgage, but does not give possession to the mortgagee, there is a breach of the contract from the first moment of such non-delivery, and limitation runs from that time; *Hikmatulla v. Imam Ali*, I. L. R. 12 All. 203; *Ram Chand v. Gyan Chand*, Panj. Rec. No. 134 of 1883.

**Art. 136.** *By a purchaser at a private sale for possession of immoveable property sold, when the vendor was out of possession at the date of the sale; twelve years from the date when the vendor is first entitled to possession.*

**Art. 137.** *Like suit by a purchaser at a sale in execution of a decree, when the judgment-debtor was out of possession at the date of the sale; twelve years from the date when the judgment-debtor is first entitled to possession.*

**Art. 138.** *By a purchaser of land at a sale in execution of a decree for possession of the purchased land, when the judgment-debtor was in possession at the date of the sale; twelve years from the date of the sale.*

### Notes.

Arts. 136 and 137 are the same as Arts. 136 and 137 of Act IX of 1871, with the exception that the term "judgment-debtor" has been substituted for the term "execution-debtor" in two places. Art. 138 corresponds to Art. 138 of the former Act, but after the words "the purchased land" followed "when he never has had possession" instead of what now appears.

Articles 136 and 137 apply to suits brought by purchasers against third persons in possession of the land, in whose favour limitation runs against the purchaser in the same way as it would against the owner, with whose rights the purchaser is clothed; *Bhikaree v. Ajodhya*, 3 W. R. 176 (a case of a private sale); for in both cases what is sold is, whatever is, at the time of the sale, or, at the time of attachment in the case of a sale in execution of a decree, in the power of the owner to sell; *Sobagchund v. Bhaichund*, I. L. R. 6 Bomb. at p. 202. See, also, *Dinendronath v. Ram Coomar*, 8 I. A. 65; S. C. 10 C. L. R. 281; *Lakshman v. Bisansing*, I. L. R. 15 Bomb. 261; approved of by Telang J., in

*Lakshman v. Moru*, I. L. R. 16 Bomb. 722; and followed in *Namdev v. Gomaji*, I. L. R. 18 Bomb. 37. Great care is needed to bear in mind the fact that these two Articles apply to suits against third parties, because, in the case of *Sheo Prasad v. Udai Singh*, I. L. R. 2 All. 718, the High Court at Allahabad seemed to be of opinion that an owner, *actually entitled* to property at a certain date, was not *in law entitled to the possession* of it until he had obtained a decree declaring his pre-existent right, and held that, in the case of such an owner out of possession at the time of sale, who subsequently got into possession, Art. 136 might apply. In this case, the vendor was actually entitled to possession before August, 1864, in which month a decree was passed in his favour, which was afterwards upheld by the Privy Council; but the Court held that the case fell *either* under Art. 136 or Art. 144, although the suit was not brought by the purchaser until 1877, when it was barred under Art 136, as having been brought more than twelve years after the date when the owner was *first entitled* to possession. The Article which governs the case of a suit by a purchaser against a dispossessed owner subsequently recovering possession is Art. 144, and then limitation would run from the time when the vendor began to hold adversely to the purchaser by taking possession of the land which was no longer his; *Tew v. Jones*, 13 M. and W. 12; *Ram Prasad v. Lakhi Narain*, I. L. R. 12 Calc. 197; *Sayad Nayamutulla v. Nana*, I. L. R. 13 Bomb 424. B, a mortgagee, was in possession of land from 1866 under a mortgage from C, which was subsequently redeemed and possession given up by B. Prior to redemption B purchased a share of the land from D, who had not been in possession since the date of the mortgage. In 1885 B brought a suit to recover possession of the share he had purchased from D, but it was held that his possession as mortgagee from C did not avail to prevent limitation running during the time D was out of possession; *Nundoo Lal v. Jodu Nath*, I. L. R. 14 Calc. 674.

Article 136 applies to the purchaser of a share in a joint family property, the vendor of which was out of, *i. e.*, excluded from, possession; *Ram Lakhi v. Durga Charan*, I. L. R. 11 Calc. 680; but Art. 144 would seem to be more applicable.

*Article 137.* On 25th September 1867, A conveyed lands to B, but A still remained in possession. In 1874, B still being out of possession, C purchased the land at an auction-sale in execution of a decree which he had obtained against B. On 26th September 1879, C brought a suit against A to recover possession of the land, but it was held it was barred, as more than twelve years had elapsed since B became entitled to possession; *Anund Coomari v. Ali Jamīn*, I. L. R. 11 Calc. 229; *Syad Nayamtulla v. Nana*, I. L. R. 13 Bomb. 424.

*Article 138* will apply to a suit against the owner remaining in possession; but to a suit against a third person getting into possession independently of any action on the part of the previous owner, and before the purchaser gets possession, Art. 144 would more appropriately apply, as under that Article limitation would run from the time the defendant took possession adversely to the purchaser; but if the third person got into possession through the owner, he would be able to tack on the owner's adverse possession to his own, and it would be immaterial whether this Article or Art. 144 was held to be applicable; *Namdev v. Gomaji*, I. L. R. 18 Bomb. 37.

This Article applies to the assignee of the purchaser, as well as to the purchaser himself; *Arumuga v. Chockalingam*, I. L. R. 15 Mad. 331.

The "date of the sale" is that of the actual sale, not that of its confirmation; *Venkatalingum v. Veerasami*, I. L. R. 17 Mad. 89.

A purchaser of land at an auction-sale in execution of a decree should endeavour to obtain possession through the Court; *Kristo Gobind v. Gunga Pershad*, 26 W. R. 372; *Lolit Coomar v. Ishan Chunder*, 10 C. L. R. 285; and if he is once put into actual possession by the Court this Article will not apply; *Agarchand v. Rakhma*, I. L. R. 12 Bomb. 678.

If he is not put into possession by the Court, a suit for possession is still open to him; *Seru Mohun v. Bhagoban*, I. L. R. 9 Calc. 602; *Iswar Pershad v. Jai Narain*, I. L. R. 12 Calc. 169; *Kishori Mohun v. Chunder Nath*, I. L. R. 14 Calc. 644. Symbolic possession under Sect. 224, C. P. C., 1859, gives a new starting-

point for limitation against the judgment-debtor, but is, however, of no avail against third parties; but if a third party should subsequently dispossess the plaintiff by receiving the rents, the plaintiff will have twelve years from the date of that dispossession to bring a suit; *Juggobundhu v. Ram Chunder*, *I. L. R.* 5 *Calc.* 584 (*F. B.*); followed in *Juggobundhu v. Permanund*, *I. L. R.* 16 *Calc.* 580 (*F. B.*), overruling *Krishna Lall v. Radha Krishna*, *I. L. R.* 10 *Calc.* 402, which decided that if the formal possession given by the Court was infructuous, the purchaser must bring his suit against the judgment-debtor within twelve years from the date of sale. See, also, *Dcyanidhi v. Kelai Panda*, 11 *C. L. R.* 402. This point was discussed by *Telang J.*, in *Lakshman v. Moru*, *I. L. R.* 16 *Bomb.* 722; and he seems to arrive at the same conclusion with regard to the rights of a third party, as was arrived at in the two Calcutta Full Bench cases.

Where a lease purports to be a perpetual lease without any reversion to the grantor, and no rights are reserved to him, but only a nominal rent, symbolic possession as against the grantors will not be effective as against the lessees; *Gossain Dalmar v. Bepin Behary*, *I. L. R.* 18 *Calc.* 520. Where the purchasers of property sued to get possession of property bought at a sale in execution of a decree from persons in possession under a fictitious mortgage: it was held that this Article applies as their possession was that of the judgment-debtor; *Uma Shankar v. Kalka Prasad*, *I. L. R.* 6 *Calc.* 75.

The purchaser at a sale for arrears of Government revenue stands on a different footing to purchasers at sale in execution of decrees; limitation against him cannot under any circumstance run before the date of purchase, *Narain Chunder v. Tayler*, *I. L. R.* 4 *Calc.* 103.

**Art. 139.** *By a landlord to recover possession from a tenant; twelve years from the date when the tenancy is determined.*

### Notes.

This Article is the same as Art. 140 of Act IX of 1871.

This Article applies only to suits between persons between whom the legal relation of landlord and tenant has been created

and determined, in which the subject-matter of the suit arises directly out of the determination of that relationship; suits by all other reversioners fall under Art. 140; *Krishna Gobind v. Huri Churn*, I. L. R. 9 Calc. 367. The fact that no rent has been actually paid does not prove that the relation of landlord and tenant does not exist; *Bhugwan Doss v. Sheo Narain*, 23 W. R. 253. It also refers to tenancies in respect of which the leases have expired, or to other tenancies terminable by notice, not to so-called tenancies the tenure of which is permanent in its nature; *Madho Koery v. Tekait Ram*, I. L. R. 9 Calc. at p. 417; *Bejoy Chunder v. Kally Prosunno*, I. L. R. 4 Calc. 327.

*Determination of tenancy.*—Where a demise or agreement specifies the term or event upon which the tenancy is to end, on the expiry of that term or the happening of that event, the tenancy is determined *ipso facto*; per Lord Mansfield, C. J., in *Right v. Darby*, 1 T. R. 162; *Messenger v. Armstrong*, *ib.* 54; *Cabb v. Stokes*, 8 East, 358, 361; *Wilson v. Abbott*, 9 B. and C. 88; *Doe v. Inglis*, 3 Taunt. 54; *Doe v. Sayer*, 3 Camp. 8. A tenancy-at-will does not need a notice to determine it, but a demand of possession is necessary; *Goodtitle v. Herbert*, 4 T. R. 680; *Doe v. McKaeg*, 10 B. and C. 721. A tenant-at-sufferance is not entitled to any notice to quit or demand of possession; *Doe v. Lawder*, 1 Stark, 308; *Doe v. Maisey*, 8 B. and C. 767. Where a person holds over after the expiry of a lease for a term of years, he becomes a tenant by sufferance, but time does not begin to run against the landlord until the tenancy by sufferance is determined; *Adimulam v. Pir Ravuthan*, I. L. R. 8 Mad. 424; and the High Court held that the wording of this and the succeeding Article shews that the law of India differs from that of England on this point. In England limitation would run against the landlord from the termination of the lease, but that in this country, the words of this Article are “where the *tenancy* is determined,” the Court must not look at the date of the determination of the original tenancy, but as a person holding over after that date becomes a tenant by sufferance, it is not until this last tenancy is terminated that limitation begins to run; but as this tenancy is one which need not be determined by notice before a suit is brought,

it would seem that this decision introduces grave difficulties in the determination of the point as to when limitation commences under this Article; see, also, *Govind Lall v. Debendronath*, *I. L. R. 6 Calc.* at p. 316.

A tenancy from year to year must be determined by a notice to quit expiring at the end of some year of the tenancy, and in England by a six months' notice; *Parker v. Constable*, 3 *Wils.* 25; *Good v. Howell*, 4 *M. and W.* 198. In the case of an ordinary weekly or monthly tenancy of lodgings or apartments in England, a notice to quit is not implied as part of the contract, unless there be a usage to that effect; *Towne v. Campbell*, 3 *C. B.* 921; *Huffel v. Armitstead*, 7 *C. and P.* 56, 57, 58; but where a house is taken by the month, and a month's notice is given, that is certainly sufficient, in the absence of a special stipulation to the contrary; *Doe v. Hazell*, 1 *Esp.* 94; but wherever a notice is necessary it must expire on the last day of some period of the holding; *Doe v. Bayley*, 5 *C. and P.* 67. In all cases, however, these general rules may be modified by special agreement, or by custom.

Mere failure to pay rent does not determine a tenancy; *Prem Sukh v. Bhupia*, *I. L. R. 2 All.* 517; nor does it constitute an adverse holding; *Huronath v. Jogendur*, 6 *W. R.* 218.

Proof of service of notice to quit which is confined to proving that such a notice addressed to the tenant was published in a local newspaper, under circumstances which made it highly probable that the notice in question came to the knowledge of the tenant, without more, will not suffice to put an end to the tenancy; the person to be affected must be addressed in a way which leaves no reasonable doubt of his knowledge; *Chandmal v. Bachraj*, *I. L. R. 7 Bomb.* 474.

A defendant who has set up a title as tenant, which is disproved, cannot be thereafter treated as a tenant so as to bring the suit, under this Article, but must be treated as a trespasser, and the case will then fall under Art. 144; *Dino Monee v. Doorga Pershad*, 21 *W. R.* 70 (*F. B.*); *S. O. 12 Ben. J. R.* 285; *Maidin v. Nagapa*, *I. L. R. 7 Bomb.* 96; but a defendant who is sued in ejectment as a tenant cannot by a disclaimer of the landlord's title after suit

filed, so alter the nature of the suit as to do away with the necessity of the plaintiff, proving that he gave due notice to the defendant whereby the tenancy was put an end to; *Vithu v. Dhonde*, P. J. 1890, p. 343, and cases cited therein.

**Art. 140.** *By a remainderman, a reversioner (other than a landlord), or a devisee, for possession of immoveable property; twelve years from the date when his estate falls into possession.*

**Art. 141.** *Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female; twelve years from the date when the female dies.*

### Notes.

Art. 140 is the same as Art. 141 of Act. IX of 1871; Art. 141 corresponds to Art. 142 of that Act, but instead of applying to titles arising on the death of *Hindu widows* only, it now includes title arising on the death of *females*, whether Hindu or Mahomedan.

**Article 140. Remainder.—Reversion.**—The words “remainderman,” “reversioner,” and “devisee” are used in this article as technical terms of English law; *Bala v. Jati*, *Panj. Rec.* No. 155 of 1883. If a tenant in fee simple, should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for, in each case, his grantee has a less estate than himself. Accordingly on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the tenant in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will *revert* to himself or his heirs, and he or his heirs will again become tenant in fee simple in possession. During the continuance of the estate so disposed of by him, termed in law the *particular estate*, the interest of the tenant in fee simple, which still remains undisposed of, is called his *reversion*.

If at the same time with the grant of the particular estate he should also dispose of this remaining interest or reversion, or any



part thereof, to some other person, it then changes its name and is termed, not a reversion, but a *remainder*. A remainder, therefore, always has its origin in express grant; a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties; *Williams on Real Property*.

*Falls into possession.*—Under Hindu law, the estate of a devisee under a Will falls into possession on the date of the testator's death, and a claim for immoveable property devised to the plaintiff must, therefore, be brought within twelve years from that date; *Mylapore v. Yeo Kay*, 14 I. A. 168; S. C., I. L. R. 14 Calc. 801; although provision may have been made in the Will for the management of the estate to be carried on for a time by a person other than the devisee; *Krishna v. Panchuram*, I. L. R. 17 Calc. 272. The estate of the heir of an hereditary officer falls into possession on the death of the incumbent of the office; *Babaji v. Nana*, I. L. R. 1 Bomb. 535.

Where the plaintiff purchased a *talook* part of which was held by some of the defendants under an *ijara*, and the *ijaradars* had been dispossessed by other defendants and the plaintiff brought a suit to recover possession of the land comprised in the *ijara*, it was held that the suit fell under this Article, and was in time, if brought within twelve years from the expiration of the term of the *ijara*; *Krishna Gobind v. Huri Churn*, I. L. R. 9 Calc. 367; see, also, *Sheo Sohye v. Luckmeshur*, I. L. R. 10 Calc. 577; *Bissessur v. Baroda Kanto*, *ib.* at p. 1079; *Sharat Sundari v. Dhobo Persad*, I. L. R. 13 Calc. 101.

Where the holder of a *vatan* alienates the *vatan*, limitation against his immediate heir runs from the death of the holder who alienated it; *Ravljajirav v. Balvantrav*, I. L. R. 5 Bomb. 437; and where a *dharma* *markarta* improperly alienates trust-property, limitation against his successor will run from the date of the death of the former; *Mahomed v. Ganapati*, I. L. R. 13 Mad. 277. Consequently, if a holder alienates his holding for a longer period than his own life, and his heir suffers twelve years to pass without ousting the alienee, not only is the first heir barred, but his heirs also.

In an impartible *zamindari*, as between the joint family and claimants under a title adverse to it, the *zamindar* and co-parcener in actual enjoyment represents for the purposes of limitation the whole family, and, when his right is barred, the right of those entitled to succeed is barred also; *Vijayasami v. Periasami*, *I. L. R. 7 Mad.* 242; followed in *Koolappa v. Koolappa*, *I. L. R. 17 Mad.* 34; the same holds good in respect of adverse possession against the holder for the time being of service *vatan* lands; *Radhabai v. Anandrav*, *I. L. R. 9 Bomb.* at p. 229; and the fact that during a portion of the adverse possession there was no legal holder of the estate wrongfully alienated does not stop time running in favour of the alienee; *Vithalbowa v. Narayan*, *I. L. R. 18 Bomb.* 507.

Where a *karnam* sued to recover land as part of the *miras* property attached to his office and failed on the ground that the suit was barred by limitation, his successor cannot again sue to recover the same land; *Venkayya v. Suramma*, *I. L. R. 12 Mad.* 235.

Where a *vahivatdar* makes a perpetual lease, such lease being invalid as being beyond the powers of a *vahivatdar*, it enures as a tenancy from year to year on the terms of the lease, and adverse possession cannot commence until the expiry of the last year commenced during the life-time of the deceased *vahivatdar*; *Narayan v. Yamunabai*, *P. J.* 1889, p. 136.

In endowments, where a founder has vested in a certain family the management of the endowment, each member succeeds to the management *per formam doni*; therefore where the share of one member has been sold in execution of a decree against him, that sale only affects the interest which he had in the endowment, and on his death, his successor will be entitled to take his place unaffected by the execution proceedings; *Trimbak v. Narayan*, *I. L. R. 7 Bomb.* 188.

*Article 141.*—In order that this article should be applicable there must be an estate of the nature of a fee simple, or some analogous estate, out of which there has been carved by operation of law, or otherwise, an estate to be held by, and for the life of,

a female, and a remainderman or reversioner who is entitled to the remainder or reversion on the death of that female ; it does not apply to the case of a Hindu widow adopting during her lifetime a son to her deceased husband, as he is not a remainderman, but comes in by a paramount title which puts an end to her estate, before it comes to a natural end by her death. See *Moro Narayen v. Balaji Raghunath*, P. J. 1894, p. 318. It could scarcely be held to apply where there had been a person in possession, even with the consent of the widow, whose title, if a good one, was paramount to that of the widow, for then the widow would never have had any estate at all, and there would be no remainder or reversion to which anyone could be entitled on the female's death. This point seems to me to have been overlooked, or not given sufficient weight to, by *Parsons, J.*, in *Carsondas v. Vendravandas*, I. L. R. 14 Bomb. 482, referred to hereafter. It applies to cases where the female has been entitled for her life and to suits by persons claiming on her death under a title *independent* of hers, in the same way as Art. 140 applies to suits by other remaindermen and reversioners ; *Hashmat v. Mazhar Hussain*, I. L. R. 10 All. 346. It does not apply to the case of a person suing on the very same cause of action which accrued to a female, and claiming as her heir ; *Azam Bhuyan v. Faizuddin*, I. L. R. 12 Calc. 594. This ruling is contrary to that in *Mothura v. Borkad*, 11 O. L. R. 312, where Art. 140 or Art. 141 was held to apply to the case of a daughter's son claiming as heir to his mother ; but the later case would appear to be the more correct decision.

The interpretation and application of this Article has caused a divergence of opinion between the High Courts in India, which will not be settled until a case goes up to the Privy Council on the point whether in any case adverse possession during the lifetime of the female can bar the reversionary heirs, or whether limitation runs against the reversionary heirs only from the death of the female, no matter what the circumstances may be under which the adverse possession was gained and continued. The High Court at Calcutta has ruled that in every case limitation runs from the death of the female. The High Courts at Madras

and Allahabad have ruled that there may be possession adverse to the reversionary heirs during the life-time of the female. The High Court at Bombay has not yet had the opportunity of settling the point, though there is a decision of a single Judge in favour of the Calcutta view. The question is one of such importance, that it will be well to notice in detail all the cases on the point.

In Calcutta the earliest case under Art. 142 of the Act of 1871, which corresponds to this Article, except in that it applies to Hindu widows only, is *Saroda Soondury v. Doyamoyee*, I. L. R. 5 Calc. 938, in which it was held that the person entitled to the possession of immoveable property on the death of a Hindu widow means a person who succeeds to a certain right *which is in being* on the death of the Hindu widow, and that if the title which would have enabled that widow to hold the estate as a widow had become barred before her death, the reversioner, who would be the next taker, is not to be entitled to possession of the property on the death of the widow. This case was followed by that of *Gya Persad v. Heet Narain*, I. L. R. 9 Calc. 93, which arose under the present Act in which it was held that a title by adverse possession accrues even during the life-time of a Hindu widow, but if possession arises directly from any invalid alienation on her part, special provision is made for the right to sue on the part of the reversioners within twelve years from her death. In both these cases the female seems never to have been in possession of the property in dispute, which was in the possession of a third party holding it as his own at the time the female's right was alleged to have accrued, which differentiates them from the case hereafter referred to in I. L. R. 9 Calc. 935, in which the alleged adverse possession arose from an unauthorized act of one of two females who were in joint possession. In *Pursut Koer v. Palut Roy*, I. L. R. 8 Calc. 442, the Court held the possession to have had its inception in an *ikrarnama* given by the widow, and, therefore, not to be adverse to the reversioners, which was also the case in *Sheo Narain v. Kurgo Koery*, 10 C. L. R. 337. In *Srinath Kur v. Prosunno*, I. L. R. 9 Calc. 934 (F. B.); S. C., 13 C. L. R. 372 (the effect of which is to overrule the previously cited case of *Soonduree v. Doyamo-*

see : see *I. L. R.* 21 *Calc.* p. 11); the Court held that the rule which had heretofore been observed under the Limitation Act of 1859, that possession which barred the owner of the inheritance for the time being (although a female), barred also the reversioner, had been altered by Art. 142 of Act IX of 1871, and that the alteration had been continued by Art. 141 of Act XV of 1887, and that consequently, *in all cases* the reversioner had twelve years from the death of the female in which to sue. But, as mentioned before, this was a case of alienation by a female, and would not have been barred under the old rulings. This principle had however been previously applied to a case in which the defendant had taken forcible possession of immoveable property and held it adversely to the widow; *Dwarka Nath v. Komolmoni*, 12 *C. L. R.* 548, and this case was cited in the argument in that last referred to. Subsequently, in a second appeal, in which it was found by the lower Court that the possession was *not adverse* to the widow, the Court held that, even if the possession had been adverse to the widow, the case would have fallen under this Article, and limitation would not have commenced to run against the reversioner until the widow's death; *Kokilmoni v. Manick Chandra*, *I. L. R.* 11 *Calc.* 791. Of course, if the female had been ousted by a trespasser whilst her estate was in existence, it may well be that this principle rightly applies, but it seems as if it had been expressed in too wide terms, for no account is taken of cases in which the adverse possession for twelve years might be under an alleged title paramount to that of the female, *e. g.*, the trespasser claiming to be an undivided brother, a son, or an executor. Surely the person claiming as reversionary heir would not be entitled after the expiry of nearly twelve years from the death of the widow, to file a suit charging that the alleged trespasser was not an undivided brother, a son, or an executor. It would seem more reasonable to hold that the alleged trespasser, having come in claiming a title which would prevent the estate of the female coming into existence at all and thus prevent there being any reversionary heir, was holding adversely, not only to the widow, but also to the reversioner, and this is what has been held in Madras and Allahabad.

The point just before alluded to still remains undecided, but in a late case before the Privy Council, that Court, affirming the decree in the High Court at Calcutta, has held that where a Hindu female, who represents the whole estate of the male from whom she inherits property, but yet has only a limited interest in that property, brings a suit against a trespasser, whether a stranger or one of the same family, and fails in the suit, the decree in that suit binds the reversionary heirs who would be entitled at her death, and they cannot claim the benefit of this Article, *Hari Nath v. Mothermohun*, 20 I. A. 183; I. L. R. 21 Cal. 8. This is of course the case of a decree adverse to the widow, but it seems to me that if the trespass had simply been a trespass against the estate of the widow, then the decree could only have been against the widow personally, which would not bind the estate, but if the decree was against the widow as representing the estate, then it shews that there are some trespasses against the widow which are trespasses against the estate, and, if so, it is scarcely equitable to hold that in such a case, the trespass shall not avail against the remaindermen unless there has been a decree which is held to bind the estate.

There are two decisions on this Article in Madras. Where a defendant gets into possession under an invalid alienation made by a widow, his possession is not adverse to the reversioners until the widow's death; but when the defendant comes into possession by an act of trespass, then the title which he acquires is good against the representative of the inheritance for the time being, and consequently good against the reversioner; *Sambasiva v. Ragava*, I. L. R. 13 Mad. 512. This case is not very satisfactory, because the defendant eventually was held to be in possession under an invalid alienation, and the part of the ruling quoted was, therefore, unnecessary for the decision of the case, and in the judgment the point raised by the Court in Calcutta as to the change of law under the last two Limitation Acts is not discussed. In an earlier case, however, which fell under this Article, the Court, acting upon the case of *Saroda Soondury v. Doyamoyee*, I. L. R. 5 Calc. 940: held that, where a testator had, by a Will alleged to have been invalid, devised all his self-acquired property

to his executors for their benefit, subject only to certain payments to his widows during their life-time, and the executors had been in possession under the Will for more than twelve years, the possession was adverse to the widows and to the reversionary heir also, and that no new period of limitation arose in favour of the reversioner on the death of the widows; *Kolla Subramanian v. Thellanayakulu*, *I. L. R. 4 Mad.* 124. Where a Hindu widow who has no right to an impartible *Zemindari*, maintains possession against the rightful heir, her possession is adverse to him and to all claiming through him, and no fresh right accrues to him or his representatives on her death; *Koolappa v. Koolappa*, *I. L. R. 17 Mad.* 34.

In Allahabad, it has been held that, where a person takes possession of property on the ground that he was joint in estate with a deceased person who was in possession thereof at the time of his death, he holds adversely not only to the widow but also to those who would be reversionary heirs on the death of the widow if the property had been the separate estate of the deceased; *Adi Deo v. Dukharan*, *I. L. R. 5 All.* pp. 537, 538. Further that, where the possession during the life-time of the female is openly adverse to the reversioners as well as to the female, as that of a person claiming to be a son adopted by the deceased owner of the property, limitation runs from the time adverse possession begins, and not from the death of the female; *Ghandharap v. Lachman*, *I. L. R. 10 All.* 485. This case seems at first sight to be a little at variance with *Basdeo v. Gopal*, *I. L. R. 8 All.* 644, in which the defendant set up a claim through an alleged adopted son, but the facts of the case, and especially the dates, are not set out sufficiently fully to enable the real effect of the decision to be determined. Since the decision of these cases, it has been held that where a person without title takes possession of property and holds it adversely to the widow, the reversionary heir has twelve years from her death in which to sue; *Ramkali v. Kedar Nath*, *I. L. R. 14 All.* 156 (*F. B.*).

In Bombay it has been held that adverse possession for more than twelve years as against a widow will bar the claim of a son adopted by her after that time; *Krishnaji Morbhat*, *I. L. R. 13*

*Bomb.* 276; but see now *Moro Narayan v. Balaji Raghunath*, *P. J.* 1894, p. 318, where the contrary has been held, and it was pointed out that in the previous case adverse possession was complete before the Act of 1871 came into force. Between the dates of these two cases, *Parsons, J.*, held that where a Hindu testator bequeathed his separate property, away from his widows, to trustees upon void charitable trusts, and the trustees had acted on those trusts during the life-time of the widows, the possession of the trustees of the immoveable property does not become adverse to the reversioner until the death of the widows; *Carsondas v. Fundravundas*, *I. L. R.* 14 *Bomb.* 482. In this case, however, the decision is based upon the fact that the charitable bequest was invalid, but it has been held in England that the possession of trustees under a void charitable deed was adverse to the heirs of the grantor; *Churcher v. Martin*, 42 *Ch. D.* 312. There is, also, an *obiter dictum* in Bombay founded on the case of *Srinath Kur v. Prosunno Kumar*, referred to among the Calcutta cases, to the effect that when the widow dies a new right of action accrues to the reversioner then living; *Chhaganram v. Motigavri*, *I. L. R.* 14 *Bomb.* p. 515. The two widows of Nathu, a Hindu, divided his property among them. One of them sold her share which eventually came into the possession of the plaintiff, and subsequently died. On the death of the other widow at a later date, the daughter of Nathu claimed the whole of the property, and it was held that, unless the sale by one widow was under such circumstances as to bind the family, the possession of the plaintiff did not become adverse to the daughter till the death of the second widow; *Mukta v. Dada*, *I. L. R.* 18 *Bomb.* 216.

Thus, it will be seen that the law at present is in a very unsatisfactory condition. It is, of course, right that this Article should apply to cases of invalid alienation by a female, and *perhaps* to cases of a mere trespasser on the property after *the estate of the female has come into possession*; but it would seem to be unjust that this should apply to a case where a female is entitled absolutely, and what is claimed on her death is not a reversion but an inheritance. This case is probably met by the words "like suit" which may be interpreted to mean "a suit for possession



by a person who stands in the position of remainderman or reversioner," as was held in *Azam Bhuyan v. Faizuddin*, *I. L. R.* 12 *Calc.* 594; and *Hashmat Begum v. Mazhar Hussain*, *I. L. R.* 10 *All.* 346. It would seem, also, to be unjust that this Article should apply to cases in which the trespass has commenced before the female's estate fell into possession, or to cases in which the adverse possession is under an alleged right which would prevent the estate of the female ever coming into existence. As an instance, take the case of a separated Hindu dying, leaving a widow who survives him for twenty years. On the death of the husband a person takes possession of the whole of the property, alleging he is an adopted son, and continues in possession adverse to the widow during the whole of the widow's life-time. If this Article applies, the person who would be the reversionary heir, supposing there was no son adopted, would have twelve years from the death of the widow to bring a suit against the trespasser, if he framed his plaint in the right way, and the alleged trespasser would then have to prove his adoption after a lapse of thirty-two years. Of course, this is an extreme case, but it seems to be a fair sample of what the ruling in Calcutta may lead to. The adoption of the rules laid down in Allahabad and Madras would lead to no practical injustice as the nearest presumptive heir could always bring a suit against the person in possession adverse to the widow for a declaratory decree as to his rights within six years from the date when the possession began; *Chhaganram v. Motigavri*, *I. L. R.* 14 *Bomb.* 512; *Jhula v. Kanta Prasad*, *I. L. R.* 9 *All.* 441; or, under proper circumstances, a more remote reversionary heir might do so; *Rani Anund v. Court of Wards*, 8 *I. A.*, p. 23; *Koer Golab v. Rao Kurun*, 14 *Moore I. A.* 193. But see, however, the remarks of Kay, J., as to the rights of an heir-apparent in *Stockley v. Parsons*, 45 *Ch. D.* 51.

Where the estate of a deceased Hindu held jointly by his two widows, on the death of one of them, survives to the other alone, no cause of action can accrue to the reversioner until the death of the survivor, even in respect of a moiety of the property; *Gobind v. Dulmeer*, 23 *W. R.* 125.

Whatever may be the exact scope of this Article, it is clear that it is applicable to the case of a plaintiff claiming a childless owner's estate on the death of his widow, in spite of an alienation made by the male owner, at any rate where twelve years have not elapsed from the death of the owner, or that of his widow; *Budhe v. Makhe*, *Panj. Rec.* No. 31 of 1892.

Act XV of 1856, Sect. 2, provides that on the re-marriage of a Hindu widow all her rights in the property of her deceased husband as his widow shall cease as if she died at the date of her re-marriage; but this section does not make this Article applicable to suits to recover property on the re-marriage of the widow, but to such cases Art. 143 would be applicable, and limitation would run from the date of re-marriage.

**Art. 142.** *For possession of immoveable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession; twelve years from the date of the dispossession or discontinuance.*

### Notes.

This Article is the same as Art. 143 of Act IX of 1871.

In a suit which falls under this Article the plaintiff must prove that he was possessed and dispossessed of immoveable property within twelve years before the time when he filed his suit; *Mahomed Ali v. Abdul Gunny*, *I. L. R.* 9 *Calc.* 744 (*F. B.*); and the various cases cited therein; followed in *Mohiny Mohun v. Krishno Kishore*, *ib.* 802; see, also, *Bhootnath v. Kedarnath*, *I. L. R.* 9 *Calc.* 125, in which case, however, the law does not seem to be stated quite accurately, as would appear from the foregoing case; *Vittoba v. Sankar*, *P. J.* 1877, p. 114; *Mussamut Debea v. Roy Jung*, 8 *I. A.* at p. 214; *Moro Desai v. Ramchandra*, *I. L. R.* 6 *Bomb.* 508; *Gopaul Chunder v. Nilmoney*, *I. L. R.* 10 *Calc.* 374; *Mohima Chunder v. Mohesh Chunder*, *I. L. R.* 16 *Calc.* 473 (*P. C.*); *Kashinath v. Shridhur*, *I. L. R.* 16 *Bomb.* 343.

The difference between suits falling under this Article and those which fall under Art. 144 is that under this Article proof of the plaintiff's possession within twelve years and subsequent

dispossession is necessary, whereas under Art. 144, possession within twelve years need not be proved, but as soon as title is shewn in the plaintiff, the defendant must prove twelve years' adverse possession in order to establish his defence; *Gopaul Chunder v. Nilmoney*, I. L. R. 10 Calc. 374, in which it is pointed out that *Rao Karan v. Bakar Ali*, 9 I. A. 99, does not conflict with the foregoing case of *Mahomed Ali v. Abdul Gunny*; see, also, *Parmanund v. Sahib Ali*, I. L. R. 11 All. 438; *Faki Abdulla v. Babaji*, P. J. 1890, p. 29; followed in *Hanmanta v. Mahadeo*, I. L. R. 18 Bomb. 513; see, also, *Jafar Husein v. Mashug Ali*, I. L. R. 14 All. 194.

A who was the owner of land which was lying waste sold it to the plaintiff in 1881. The defendant was then in possession of the land, but had in 1862 admitted A's title to it, he (the defendant) then not being in possession. It was held that the plaintiff was not bound to prove that his vendor was in possession of the land within twelve years of the filing of the suit, but that the defendant must prove when he first took adverse possession; *Muhammad v. Ghulam, Panj. Rec.* No. 49 of 1884: compare this with *Kashinath v. Shridhur*, I. L. R. 16 Bomb. 343.

*Dispossession* is that which occurs where property, which is capable of being taken possession of, is taken actual possession of by another; and does not apply to a case where property is submerged by an act of God, and so made impossible of occupation or actual possession; per *White, J.*, in *Kally Churn v. Secretary of State*, I. L. R. 6 Calc. at p. 739. The dispossession of a *ticcadar* by a third party is not necessarily a dispossession of the owner of the land; *Sheo Sohye v. Luchmeshur*, I. L. R. 10 Calc. 577. A forcible taking possession of land and a subsequent dispossession shortly afterwards do not amount to possession and dispossession so as to bring the case under this Article; *Tara Bawn v. Abdul Guffer*, 12 C. L. R. 486; *Golam Nabi v. Biswanath*, 12 W. B. 9; *S. C. 3 Ben. L. R. Ap.* 85; *Premchund v. Hurree Doss*, 22 W. R. 259.

Where the defendant gathers the fruit of mango-trees claimed by the plaintiff, that amounts to dispossession, and a suit to

recover possession must be brought within twelve years of the first of such acts; *Bapu v. Dhondi*, *P. J.* 1891, p. 221.

Where the rightful owner of land has been dispossessed by a trespasser who relinquishes possession before he has acquired an adverse title by possession, he is in the same position as he was before the intrusion took place; *Agency Co. v. Short*, 13 *App. Ca.* 798; following *McDonnell v. McKinty*, 10 *Ir. L. R.* 514; and *Smith v. Lloyd*, 9 *Ex.* 562.

*Discontinuance* means an abandonment of possession by one person followed by the actual possession of another person; for if no one succeed, or can succeed to the possession vacated or abandoned, there could be no one in whose favour or for whose protection this provision could operate; *McDonnell v. McKinty*, 10 *Ir. L. R.* 514; *Smith v. Lloyd*, 9 *Exch.* 562; cited in *Pandurang v. Balkrishna*, 6 *Bomb. H. C. Rep.* at p. 129; *Kally Churn v. Secretary of State*, *ubi sup.*

A permissive occupation of premises by a person corresponds to a tenancy-at-will, and does not amount to a dispossession of, or discontinuance of possession by, the owner. Where, therefore, the owner seeks to recover premises so occupied, the suit does not fall under this Article, but under Art. 144, and limitation runs from the time when the occupation of the tenant becomes adverse to the owner; *Govind Lal v. Debendronath*, *I. L. R.* 6 *Calc.* 311; overruling the judgment of *Wilson, J.*, reported *I. L. R.* 5 *Calc.* 679.

The fact that land is merely allowed to be waste while the owner is in a distant place does not constitute discontinuance of possession; *Muhammad v. Ghulam*, *Panj. Rec.* No. 49 of 1884. A person who discontinues possession of land with no intention of returning to it, intends to deprive himself of the proprietary right thereto, but he has twelve years under this article within which he may change his mind; *Sain Ditta v. Ghulaman*, *Panj. Rec.* No. 85 of 1892.

Where a person has been dispossessed of property under a sale in execution of a decree against other persons, no summary order having been made declaring the land liable to be sold in execu-

tion of such decree, the party dispossessed can bring his suit within twelve years of dispossession ; *Jodoonath v. Radhomonee*, 7 W. R. 256 ; *Gedroo v. Baharee Lall*, 20 W. R. 165 ; *Lalchund Ambaidas v. Sakharam*, 5 Bomb. H. C. Rep. A. O. J. 139. A suit to recover lands wrongfully taken under cover of a decree may be brought within twelve years of dispossession ; *Gour Monee v. Shun Kuree*, 13 W. R. 459 ; so, too, where the dispossession was under a certificate of sale which was not conformable to or warranted by the sale itself ; *Bheem Goyallee v. Khoobun Sahoo*, 17 W. R. 429.

In a suit to recover possession of lands which had been sold to plaintiff, but which had been taken back by one of the vendors under an agreement that he would make over other lands in exchange, of which lands the plaintiff was dispossessed by a decree in favour of a third party ; it was held that plaintiff's cause of action arose on the date of the decree dispossessing him ; *Kabul Krishna v. Mohessuree*, 16 W. R. 270.

Where a plaintiff has been ousted by Government, and possession is subsequently restored to him, and then he is again ousted by Government, he is entitled to reckon the period of limitation from the second dispossession ; *Surnomoyee v. Collector of Rungpore*, W. R. 1864 (F. B.) 4 ; but where Government sold villages for arrears of revenue, and put the purchaser in possession, the fact that there may have been negotiations between Government and the plaintiff for the recognition under conditions of certain rights in respect of some of the villages will not prevent limitation running from the time of actual dispossession ; *Chaitomya v. Collector of Ganjam*, 1 I. A. 335.

Where the plaintiffs, who were proprietors of land, declined to engage for the payment of the land revenue, in consequence of which the defendants were admitted to do so, and were put in possession of the land : it was held that there was dispossession of the plaintiffs within the meaning of this Article, and that time began to run from the date of the defendants being put into possession ; *Nawab Muhammad v. Badan Singh*, 16 I. A. 148 ; *I. L. R. 17 Calc. 137*. See, also, *Nawab Muhammad v. Badan*

*Singh, Panj. Rec.* No. 23 of 1890; and *Nurain Das v. Khair Shah, Panj. Rec.* No. 121 of 1892.

Where a municipality pulled down a structure erected by the plaintiff on his own ground, claiming the site as part of the public road, and the plaintiff sued to recover possession of the site, it was held that the suit fell under this Article, and must be brought within twelve years from the time the structure was first pulled down; *Joharmal v. Municipality of Ahmednagar, I. L. R. 6 Bomb.* 580.

A suit by a plaintiff to recover possession of land taken possession of by the defendant under a conditional sale wrongfully made by the plaintiff's mother during his infancy, will fall under this Article; *Ramanser v. Raghubar, I. L. R. 5 All.* 490; followed in *Bhagvant v. Kondi, I. L. R. 14 Bomb.* 279.

A claim for a share of ancestral property of which the plaintiff has been dispossessed will not fall under this Article, but under Art. 127; *Hansji v. Valabh, I. L. R. 7 Bomb.* 297.

Suits by an occupancy *ryot* to recover lands of which he had been dispossessed by his landlord could, under the decisions of the Calcutta High Court, have been brought within twelve years from dispossession, but that is now altered by the Bengal Tenancy Act, 1885, and such suits must now be brought within two years, dispossession; *Saraswati v. Horitarun, I. L. R. 16 Calc.* 741.

**Art. 143.** *Like suit, when the plaintiff has become entitled by reason of any forfeiture or breach of condition; twelve years from the date when the forfeiture is incurred or the condition is broken.*

### Notes.

This Article is the same as Art. 144 of Act IX of 1871.

Lands in Malabar were demised on *anubhavom* tenure, and some of them were alienated by the tenant. More than twelve years after the alienation the landlord sued to eject the tenant on the ground that the tenure was thereby forfeited. It was held that the suit was barred; *Madavan v. Athi, I. L. R. 15 Mad.* 123.

Where a *wajib-ul-arz* provided that where a resident leaves the village to settle elsewhere "he shall not be entitled to cultivation and possession," and an hereditary occupancy tenant left and settled in another village giving his fields into the charge of another person; it was held that, after a lapse of more than twelve years, the proprietor of the village was not entitled to sue for the possession of those fields; *Dhian Singh v. Mahan Singh, Panj. Rec. No. 180 of 1883.*

Under an agreement with her co-sharer a Hindu widow, A, agreed that the property to which they were jointly entitled should remain in equal shares in their joint possession, and that A should not alienate the properties, but that, on her death, they should pass to her co-sharer. Subsequently A sold her share: it was held that the alienation by A was of her widow's estate only, and that was good for her lifetime; that there were no words in the agreement restraining alienation of such estate, and if there had been, there were no words of forfeiture, and no rule of law attaching forfeiture to its breach, and consequently this Article did not apply, but Art. 144, and limitation ran from the date of A's death; *Mussamut Delea v. Roy Jung*, 8 I. A. 210; *S. C. sub nom, Sahodra v. Rai Jang*, I. L. R. 8 Calc. 224. If the widow had married again, there would have been a forfeiture under Act XV of 1856, Sect. 2, and this Article would have applied.

Where a mortgagee is entitled to the possession of land on the first instalment of the mortgage money not being paid, limitation in a suit for the possession of the land would, under this Article run from the date when that instalment ought to have been paid. *Nathu v. Krishna*, P. J. 1876, p. 4.

**Art. 144.** *For possession of immoveable property or any interest therein not hereby otherwise specially provided for; twelve years from the date when the possession of the defendant becomes adverse to the plaintiff.*

#### Notes.

This Article is the same as Art. 145 of Act IX of 1871, with the exception that after the word "defendant" in the third column, the words "or of some person through whom he claims, have been omitted, but this omission does not prevent a pur-

chaser from a person in adverse possession tacking the period of his vendor's adverse possession on to his own, as was held might be done in *Woomachurn v. Mohamoya*, *W. R.* 1864, p. 130, for Sect. 3 provides that the word "defendant" includes any person through whom a defendant derives his liability to be sued; *Premaraj v. Narayan*, *I. L. R.* 6 *Bomb.* at p. 222, deals with the estate of a trespasser, but it was not a decision on this Article.

This Article applies only to suits for possession of immoveable property to which no other Article referring to the same class of suits applies; *Betts v. Mohammed Ismael*, 25 *W. R.* 523; and so long as there is any other Article directly providing a period of limitation for such suits the provisions of this Article do not come into force. See the principle laid down in *Kundun Lall v. Bansī Dhar*, *I. L. R.* 3 *All.* 170, under Art. 120; *Nawab Muhammad v. Badan Singh*, 16 *I. A.* 148; *S. C.*, *I. L. R.* 17 *Calc.* 137. A plaintiff cannot by calling a suit one for possession get behind a document or act which stands in his way, and obtain possession without setting aside the act or document; *Hasun v. Nazo*, *I. L. R.* 11 *All.* 456.

This Article applies to suits for possession of property from which the plaintiff does not allege that he has been dispossessed; *Gopi Nath v. Bhugwat Pershad*, *I. L. R.* 10 *Calc.* at p. 708. A suit by a person in possession of land, for which he has been compelled by a Revenue Court to pay rent, for a declaration of his proprietary right, is substantially a suit for possession of immoveable property as proprietor, and will fall under this Article, limitation running from the date of the decree under which he had to pay rent; *Debi Prasad v. Jafar Ali*, *I. L. R.* 3 *All.* 40.

A suit to recover possession of a *jalkar*, which is an interest in immoveable property, will fall under this Article; *Parbutty Nath v. Mudho Paros*, *I. L. R.* 3 *Calc.* 276; *Ram Gopal v. Nuri-muddin*, *I. L. R.* 20 *Calc.* 446.

A claim to an easement over land is a claim to an interest in land and will fall under this Article; *Mohunt Deo v. Mahomed*, 24 *W. R.* 300; following *Oodei v. Hurro Kishore*, 4 *W. R.* 107.



300 SUIT FOR POSSESSION NOT OTHERWISE PROVIDED FOR: [ART. 144.

A suit for possession of a tree growing in the earth is a suit for immoveable property; *Jaimal v. Ladha*, *Panj Rec.* No. 112 of 1884; although the plaintiff may intend to cut it down directly he gets possession of it; *Sakharam v. Vishram*, *P. J.* 1894, p. 42; *Bapu v. Dhondi*, *I. L. R.* 16 *Bomb.* 353.

A suit to recover possession of land comprised in an agreement by which a former suit was compromised will fall under this Article; *Betts v. Mahommed Ismael*, 25 *W. R.* 521.

At the death of A, his property was taken possession of by C under an alleged deed of sale; a suit by A's heirs to recover possession of the property, and to set aside the deed of sale would fall under this Article; *Trilochun v. Nobokishore*, 2 *C. L. R.* 10.

A mortgagee of property, whose mortgage did not entitle him to possession of the property, was one of a number of plaintiffs who sued to recover possession of the property from certain persons who had dispossessed the owners thereof. While the suit was pending the mortgagee took exclusive possession of the whole of the property, and it was held that a suit by his former co-plaintiffs to oust him from possession fell under this Article, and that limitation ran from the date when he went into possession; *Ramkishore v. Bandakaratan*, *I. L. R.* 13 *Calc.* 203.

A claim of a person under a mortgage of rents or an agreement that a debt shall be paid out of rents, to be put in possession of the lands out of which the rents issue falls under this article; *Hannant v. Babaji*, *I. L. R.* 16 *Bomb.* 172.

A mortgage of "the superstructure of a house exclusive of the land beneath" creates an interest in immoveable property; *Narayana v. Ramasawmy*, 8 *Mad. H. C. Rep.* 100.

An agreement to grant a lease does not create an interest in immoveable property nor is a suit upon the agreement a suit for the recovery of an interest in immoveable property; *Lalla Ram v. Chowbain*, 22 *W. R.* 287.

A suit seeking a declaration that the plaintiffs are entitled to be registered in the Revenue Records as owners of certain lands is not a suit in respect of an interest in immoveable property;

and is a right which does not give rise to a cause of action until it is asserted and denied; *Bhikaji v. Pandu*, P. J. 1893, p. 554.

A claim to recover revenue from the holder of land is not a claim to recover possession of an interest in immoveable property under this Article; *Alubi v. Kunhi*, I. L. R. 10 Mad. 115.

*Period of limitation.*—Under the old law it was necessary for the plaintiff to prove that he was in possession within twelve years; but that is not so under this Article and the corresponding one of Act IX of 1871. It is now sufficient if the suit be brought within twelve years from the time when the defendant's possession became adverse to the plaintiff; *Rao Karan v. Raja Bakar*, 9 I. A. 99; S. C., I. L. R. 5 All. 1; and, if the plaintiff shews any title to the land, the *onus* lies on the defendant to shew that he has been in adverse possession for twelve years at least; *Syad Nyamtulla v. Nana*, I. L. R. 13 Bomb. 424; *Parmanund v. Sahib Ali*, I. L. R. 11 All. 438; *Bela Singh v. Buta*, Panj. Rec. No. 94 of 1884. Where a trespasser has been in possession, but has acquired no adverse title by possession, the owner can still sue a subsequent trespasser, not claiming through the former one, in the same way as if no one had been previously in adverse possession; *Agency Co. v. Short*, 13 App. Ca. 793; but a continuous adverse possession for the statutory period, though by a succession of persons not claiming through each other bars the true owner; *Willis v. Earl Howe* [1893], 2 Ch. p. 553.

Where the defendant has been in *exclusive* possession of property for upwards of twelve years, he has, under this Article, a *prima facie* right to that property against all the world; *Obhoy Churn v. Gobind Chunder*, I. L. R. 9 Calc. at p. 241; see, also, *Gunga Govind v. Collector of 24 Pergunnas*, 11 Moore I. A. 345; *Gossain Das v. Issur Chunder*, I. L. R. 3 Calc. 224; *Bejoy Chunder v. Kally Prosunno*, I. L. R. 4 Calc. 327. Possession for twelve years under an invalid *kanam* operates as adverse possession in a suit by the successor of the manager who granted the *kanam* to eject the *kanamdar*; *Madhava v. Narayana*, I. L. R. 9 Mad. 244; but this case does not apply where the plaintiff seeks to redeem a *kanam*, and only disputes the validity of a renewal

of it at an increased amount; *Rairu v. Moidin*, I. L. R. 13 Mad. 39; nor where there is an existing valid lease, and another lease in perpetuity is granted by a successor of the *karnavan* who granted the former lease, which is subsequently set aside as invalid; *Ramanni v. Kerala*, I. L. R. 15 Mad. 166. In the absence of fraud and collusion, adverse possession for twelve years, during the life-time of one holder of service *vatan* lands, is a bar to succeeding holders; *Radhabai v. Anantrav*, I. L. R. 9 Bomb. 198. Where the defendant purchased from one of two co-trustees of a temple the right to manage the temple, and enjoy certain lands which formed the endowment, and held them for more than twelve years: it was held that the other trustee could not recover possession of the lands; *Kannan v. Nilakandan*, I. L. R. 7 Mad. 337.

A held possession of land adversely to B, and thereafter A let it in *patni* to C. B brought a suit for possession against A and obtained a decree, and then attempted, more than twelve years after the date of the *patni* to C, to turn C out: it was held that B's claim against C was barred by limitation; *Mohendro v. Nafur*, 1 O. L. R. 531.

Where *chur* land is resumed and held *khas* by Government, but the Government in granting leases reserved the right of the adjoining estate to come in and take a permanent settlement on the expiry of the leases, and afterwards made a permanent settlement with the defendant: it was held that the right of one of the shareholders of the adjoining estate to claim a share in the settlement did not arise until the date of the permanent settlement with the defendant; *Krishna Chandra v. Harish Chandra*, 8 Ben. L. R. 524; S. O. 17 W. R. 145; *Kristo Chunder v. Shama Soonduree*, 22 W. R. 520.

When an order has been passed, under Sect. 246 of the C. P. C., 1859, rejecting a claim, the claimant cannot afterwards, in a suit to eject him, set up that he was in adverse possession during a period which would include the date of that order; *Velayuthan v. Lakshmana*, I. L. R. 8 Mad. 506.

*Adverse possession* is possession by a man holding the land on his own behalf, or on behalf of some other person other than the true owner, the true owner having a right to immediate possession; *Bijoy Chandra v. Kally Prosonnath*, *I. L. R.* 4 *Calc.* 327; and the adverse possession to succeed must be of the same kind as the possession claimed; *Umr-un-nissa v. Mahomed Yar*, *I. L. R.* 3 *All.* 24 (*F. B.*). Where land was in farm, and the plaintiff, being a tenant to the farmer of a portion of it, was dispossessed by the defendant who thereafter remained in possession; this adverse possession of the defendant does not count as against the plaintiff when, after the expiration of the term for which the land is farmed, he as owner, seeks to eject the defendant; *Sheoji v. Dhan Singh*, *Panj. Rec.* No. 36 of 1885. B as mortgagee had been in possession of land under a mortgage from C from 1866 until 1879 when the mortgage was redeemed and he gave up possession of the whole. In 1875 B purchased a share in such property from D who had never been in possession since 1866. In 1885 B brought a suit to recover possession of his purchased share: and it was held that the subsequent purchase did not change the character of B from that of mortgagee to that of owner, and that the suit for possession was barred by twelve years' limitation; *Nundo Lal v. Jodu Nath*, *I. L. R.* 14 *Calc.* 674.

Possession is never considered adverse if its commencement can be referred to a lawful title; *Doe v. Brightwen*, 10 *East*, 583; *Thomas v. Thomas*, 2 *K. and J.* 79; *Pelley v. Bascombe*, 33 *L. J. N. S. Ch.* 100; *Lallubhai v. Mankuvar Bai*, *I. L. R.* 2 *Bomb.*, p. 413; *Govinda v. Jaya*, *P. J.* 1889, p. 52, and the cases cited therein. See, also, *Sheshi v. Venkatramma*, *P. J.*, 1891, p. 232; *Bela Singh v. Buta*, *Panj. Rec.* No. 94 of 1884. A person who is once in possession in a fiduciary character does not cease to hold in that character merely because it becomes uncertain who is the actual person to whom he has to account; *Lyell v. Kennedy*, 14 *App. Ca.* 437. The possession of the manager of a family does not become adverse until he has distinctly repudiated the management; *Nabab Mir Sayad v. Yasin Khan*, *I. L. R.* 17 *Bomb.* 755. The plaintiff in 1873 obtained a decree that he was

entitled to certain portions of land which were in the possession of the defendant, the actual boundaries of which were not defined by the decree, but were ascertained in execution in 1876. Subsequently, the defendant continued in possession of some of such lands, and the plaintiff had to file a fresh suit to get possession of them, to which the defendant pleaded limitation. It was held that limitation did not begin to run until the lands were finally ascertained in 1876; *Maharaja Jagatjit v. Sarabjit*, 18 I. A. 165; I. L. R. 19 Cal. 159.

Where a decree has been made declaring a right to, and directing a partition, but no proceedings have been taken in execution of the decree, but the parties have remained *in statu quo* without any partition being made, neither party can claim against the other to have been in adverse possession of any portion of the property; *Nasrat-Ullah v. Mujibullah*, I. L. R. 13 All. 309.

Trustees under a void deed in favour of a charitable trust held the lands comprised in the deed for twelve years and applied the income for the purposes of the trust: it was held that the title of persons claiming under the grantor was barred; *Churcher v. Martin*, 42 Ch. D. 312.

Possession of a limited interest in property may be adverse in respect to a suit to recover that interest in the same way as possession of a complete interest may be adverse in respect to a suit for the whole property; *Madhava v. Narayana*, I. L. R. 9 Mad. 244; *Sankaran v. Periasami*, I. L. R. 13 Mad. 471. Where a person having only a limited interest in land aliens it to another without limiting the time the latter is to enjoy it, the possession of the alienee does not become adverse until the estate of the alienor comes to an end; *Babaji v. Nana*, I. L. R. 1 Bomb. 535; *Jamal v. Murgaya*, I. L. R. 10 Bomb. 34.

Where joint property has been partitioned between the members of a joint family, no case of adverse possession of any parts of such property can arise as between the members of the family or persons claiming through them until after the date of the division; *Hanmanta v. Mahadev*, I. L. R. 18 Bomb. 513.

If the owner have no immediate right of possession then the holding ordinarily is not adverse to him, thus possession may

be adverse to an *ijaradar*, but, during the continuance of the *ijara*, such possession will not be adverse to the *zamindar*; *Krishna Govind v. Harri Churn*, *I. L. R.* 9 *Calc.* at p. 370; followed in *Sharat Sundari v. Bhobo Pershad*, *I. L. R.* 13 *Calc.* 101; see, also, *Womesh Chunder v. Raj Narain*, 10 *W. R.* 15 (*F. B.*); and *Khan-tomoni v. Bajoy*, *I. L. R.* 19 *Calc.* 787; possession of land by the owners is not adverse to the person who has a right to receive the Government revenue of the land so long as the owner admits he is liable to pay revenue to some one; *Alubi v. Kunhi*, *I. L. R.* 10 *Mad.* 115; but where a person, between whom and a mortgagee in possession no legal relationship exists subordinate to the latter, holds the mortgaged premises adversely to the mortgagee, he holds adversely also to the mortgagor; *Ammu v. Ramakishna*, *I. L. R.* 2 *Mad.* 226; disagreeing with *Vithoba v. Gungaram*, 12 *Bomb. H. C. Rep.* 180: in which it was held there could be no trespass on the mortgagor's estate so long as it was only equitable. In *Vithoba v. Gangaram*, the rule was laid down too widely, but in *Chinto v. Janki*, *I. L. R.* 18 *Bomb.* 51, it was held that a trespasser who ousts a mortgagee in possession is not necessarily in adverse possession as against the mortgagor though he may be, and that the *onus* of proving that the possession was adverse to the mortgagor rests upon the trespasser. The possession of a third person not claiming under the mortgagor is adverse to the mortgagee; *Sheombur v. Bhowaneedeen*, *All. H. C. Rep.* 1870, p. 233; and that of a purchaser from the mortgagor subsequent to the mortgage, but without notice of it; *Brayanath v. Khilatchandra*, 8 *Ben. L. R.* 104 (*P. C.*); *S. C.* 16 *W. R. P. C.* 33; referred to in *Shurnomoyee v. Srinath Das*, *I. L. R.* 12 *Calc.* 614; but where a person acknowledges the mortgagor's title, but, claiming a lien, is in possession, his possession is not adverse to a mortgagee who has purchased the property with the consent of the mortgagor; *Permanundas v. Jamnabai*, *I. L. R.* 10 *Bomb.* 49.

The payment of interest on a mortgage by a person who is not the owner of the equity of redemption is as against persons claiming under the mortgagor the strongest exercise of adverse possession; *Cholmondeley v. Clinton*, 2 *J. and W.*, p. 143.

In the case of jungle lands over which neither party can shew the exercise of acts of ownership, possession must be presumed to be with the person to whom they rightfully belong; *Leelanund v. Basheeroonnissa*, 16 W. R. 102; *Moochee Ram v. Bissambhur*, 24 W. R. 410.

*Vendor and purchaser.*—The possession of the vendor who remains in possession of property sold, after the execution of the conveyance, is adverse to the purchaser from that time; *Tew v. Jones*, 13 M. and W. 12; *Anund Coomari v. Ali Jamin*, I. L. R. 11 Calc. 229; so, if a vendor, out of possession at the time of sale, subsequently obtain possession, his possession becomes adverse from the time he enters; *Sheo Prasad v. Udai Singh*, I. L. R. 2 All. 718; *Ram Prasad v. Lakhi Nurain*, I. L. R. 12 Calc. 197; *Sayad Nyamtulla v. Nana*, I. L. R. 13 Bomb. 424; and where a party in possession of land agrees to surrender it to another, but continues in possession, his possession becomes adverse from the time he agreed to surrender it; *Betts v. Mahommed Ismael*, 25 W. R. 521. Where a party is in adverse possession to a vendor who sells to a third person, that person does not get a new starting point for limitation by reason of his purchase; *Brindabun v. Bhoopal*, 17 W. R. 377.

*Landlord and tenant.*—A tenant cannot hold adversely to his landlord whilst his tenancy continues, but as soon as it has terminated there is nothing to prevent him so doing; *Ammu v. Ramakishna*, I. L. R. 2 Mad. at p. 229; but the mere non-payment of rent by a tenant to his landlord, either during, or subsequent to, his term does not constitute adverse possession; *Huronath v. Jogendur*, 6 W. R. 218; *Troylukho v. Mohima*, 7 W. R. 400; *Watson v. Government*, 3 W. R. at p. 82 (F. B.); *Prem Sukh v. Bhupia*, I. L. R. 2 All. 517 (F. B.); *Tiruchurna v. Sangurien*, I. L. R. 3 Mad. 118; *Rango Lall v. Abdul Ghuffoor*, I. L. R. 4 Calc. 314; *Poresh Narain v. Kassi Chunder*, ib. 661; *Tatia v. Sadasev*, I. L. R. 7 Bomb. 40; *Dadoba v. Krishna*, ib. at p. 39; *Kazi Ahmed v. Kazi Muhamad*, P. J. 1889, p. 380; *Tota v. Sakotia*, Panj. Rec. No. 18 of 1888; *Tulsi Ram v. Jhandu*, ib. No. 186 of 1888; a landlord is in possession by his tenants although they do not pay him rent; *Motiram v. Devji*, P. J.,

1891, p. 240. The collusive payment of rent or attornment to a third party does not constitute adverse possession; *Parbutti v. Ramchand*, 3 C. L. R. 576; so long as the landlord does not acquiesce in the act; *Horenden v. Ashley*, 2 Sch. and L. 624. As between the holder of a superior, and that of an inferior, tenure, where things go on in accordance with the terms of the tenure, no adverse possession on the part of the holder of the under tenure can arise; and there must be a distinct claim on his part of some right inconsistent with the tenure before his possession can become adverse to his superior landlord; *Tekait Ram v. Srimati Madho*, 12 I. A. at p. 196 (overruling the decision of the High Court at Calcutta, reported I. L. R. 9 Calc. 411); *S. C. sub nom.*, *Ram Chundra v. Madho Kumari*, I. L. R. 12 Calc. 484. No unilateral act of the tenant can alter the character of his original title as tenant: there must be a distinct claim in opposition to the right of the landlord, which is brought to his notice and acquiesced in; *Tota v. Sakotia*, Panj. Rec. No. 18 of 1888; *Tulsi Ram v. Jhandu*, *ib.* No. 186 of 1888. Where the term of a tenancy under a *kabuliat* has expired, but the tenant still remains in possession of the land, the original tenancy must be considered as continuing, and his possession is not adverse to his landlord; *Parbutti v. Ramchand*, 3 C. L. R. 576. Where the defendants were permitted by the plaintiffs to occupy a house for many years without paying rent, but the house remained registered in the name of the plaintiffs, and they did all the repairs, paid the rates and taxes, and at the request of the defendants made certain additions to the house; it was held that the permissive tenancy was never determined, and that there was no adverse possession on the part of the defendants; *Gobind Lall v. Debendronath*, I. L. R. 6 Calc. 311.

Where land was leased to R for life, and on his death, his heirs who had been living with him continued in possession without obtaining a fresh lease, or paying any rent to the landlord, but without setting up any claim of ownership in the property; it was held that the possession of the heirs was not adverse to the landlord; *Krishnaji v. Antaji*, I. L. R. 18 Bomb. 256; following *Hellier v. Sillcox*, 19 L. J. N. S. Q. B. 295.



Where a tenant claiming a right of perpetual tenancy obtains an order from the Mamlutdar restraining his landlord from turning him out; the possession of the tenant becomes adverse from the date of the institution of proceedings in the Mamlutdar's Court; *Bapu v. Mahadaji*, I. L. R. 18 Bomb. 348.

Where a party has an agreement with a *zamindar* for a lease in respect of which a decree for specific performance is subsequently made, and the *zamindar*, after the agreement, but before the lease is actually granted, leases the lands to other persons, limitation does not run against the original grantee until the other lease is actually signed; *Bolai Chand v. Samiruddin*, I. L. R. 19 Calc. 646.

A quit rent payable in respect of a freehold tenement is barred by non-payment for the requisite number of years; *Owen v. DeBeauvoir*, 16 M. and W. 547; 5 Ex. 166; so too is one payable in respect of a copyhold tenement; *Howitt v. Earl of Harrington*, [1893] 2 Ch. 497.

The *encroachments* of a tenant upon the adjoining lands of his landlord are added to his tenure and form part thereof for the benefit of the tenant so long as the tenure continues, and for the benefit of the landlord afterwards, so that the tenant's possession of such encroachment is not adverse to the landlord, unless there is clear evidence that the tenant encroached for his own benefit alone; *Whitmore v. Humphries*, L. R. 7 C. P. 1; *Gooroo Dass v. Issur Chunder*, 22 W. R. 246; *Erskine v. Government*, 8 W. R. 232; *Esubai v. Damodar*, I. L. R. 16 Bomb. 552; in the case, however, of *Indro Bhoosun v. Goluck Chunder*, 12 W. R. 350 the contrary seems to have been held. A man in adverse possession of land does not lose the benefit of his adverse possession as against the owner by becoming tenant to the same owner of an adjoining plot of land; *Dixon v. Batty*, L. R. 1 Ex. 259. A false allegation of tenancy in a written statement does not prevent the defendant from setting up adverse possession; *Dino Monee v. Doorga Pershad*, 21 W. R. 70.

*Other contracts.*—Where property is held under a contract, express or implied, between the parties in and out of possession,

there can be no adverse possession, and the party in possession under the contract cannot change the character of his possession by his own mere will ; *Dadoba v. Krishna*, *I. L. R.* 7 *Bomb.* 34 ; and a person, who has come into possession by virtue of holding a certain position, cannot, by a wish, change the character of the possession while he holds that position ; *Mulji v. Manohar*, *I. L. R.* 12 *Bomb.* 322 ; and a person, who holds possession of property on behalf of another, does not, by a mere denial of that person's title, make his possession adverse, so as to give him the benefit of limitation ; *Bejoy Chunder v. Kally Prosunno*, *I. L. R.* 4 *Calc.* at p. 329. Where property was placed by the owner in the hands of the defendant to pay the rent, keep it in order, and enjoy the profits, until the owner's return, when the defendant was to deliver it up, adverse possession does not commence until the owner has demanded possession and been refused, or the defendant has otherwise distinctly asserted some adverse title ; *Rakhaldas v. Madhusudan*, 3 *Ben. L. R.* 409 ; see, also, *Jagannath v. Bidyanund*, 1 *Ben. L. R. A. C.* 114 ; *S. C.* 10 *W. R.* 172 ; but where the adverse claim is distinct, there adverse possession arises ; *Pitamber v. Nilmoney*, *I. L. R.* 3 *Calc.* 793. Where a person agrees to obtain a fictitious decree to protect the property of the plaintiff from certain claims against him, and obtains symbolical possession in execution of the decree on the condition that the plaintiff's possession shall not be disturbed, there is no adverse possession in the execution-creditor until he disavows the agreement, by seeking more than a nominal execution of the decree ; *Param Singh v. Lalji Mal*, *I. L. R.* 1 *All.* 403.

*Possession of Government.*—The possession of the Collector for the purpose of protecting Government revenue is not adverse to the real owner, although he may pay the surplus rents to a wrong person and afterwards hand the estate over to that person ; and the person so getting possession cannot tack on the possession of the Collector to his own, so as to bring the period of his adverse possession up to the required time ; *Rao Karan v. Raja Bakar*, 9 *I. A.* at p. 120 ; *S. C.*, *I. L. R.* 5 *All.* 1 ; see, also, *Shidhojirav v. Naikojirav*, 10 *Bomb. H. C. Rep.* 228. Where the guardianship

of land has been assumed by the governing power in consequence of dissensions among the family owning the land, and the lands are subsequently restored to the owners, the possession of a *raiyat* who cannot prove that his occupation commenced prior to the attachment is not adverse to the owners; *Tukaram v. Sajangir*, *I. L. R.* 8 *Bomb.* 585. Where Government, through the Collector, seizes lands, calling upon the previous possessors to shew their title, and, after investigation, certain orders for restoration are made by the Revenue Commissioners but the lands are not restored, the possession of the Collector becomes adverse from the date of his refusal to restore such land; *Shivram Dinkar v. Secretary of State*, *I. L. R.* 11 *Bomb.* 222; see, also, *Court of Wards v. Bunwaree*, 15 *W. R.* 102.

*Co-sharers.*—A co-sharer to prove adverse possession must shew that he has been in possession of the property as his own to the exclusion of his co-sharers; *Subbaiya v. Rajesvara*, 4 *Mad. H. C. Rep.* 357; *Shidhojirav v. Naikojirav*, 10 *Bomb. H. C. Rep.* 228; *Nilo Ramchundra v. Govind*, *I. L. R.* 10 *Bomb.* 24; *Dinkar v. Bhikaji*, *I. L. R.* 11 *Bomb.* 365. Where a co-sharer registers land in the name of himself and another, he cannot set up the plea that his possession is adverse to the other; *Deepo v. Gobindo*, 16 *W. R.* 42.

Where one co-sharer sets up, as against another, adverse possession of land, which had been previously waste land, but had been at a former time occupied jointly, it lies upon him to shew that he has held possession in such a way as to give distinct notice to his co-sharer that he was setting up an adverse title; *Rakhal-das v. Inaru*, 1 *C. L. R.* 155; see, also, *Yusuf Ali v. Chabhu Singh*, *All. H. C. Rep.* 1878, p. 122; and *Dewan Manwar v. Unnoda*, 7 *I. A.* 1; mere exclusive possession of property, which originally was joint, does not amount to adverse possession; *Shaik Asud v. Akbar*, 1 *C. L. R.* 364. The husband of a female member of a joint Hindu family had been, on the purchase of an estate, admitted by the male members as a co-proprietor of a fourth share thereof, but he was never in actual possession of any part thereof, nor in receipt of the income: and it was held that the

possession of the whole estate by the joint family or its managere unless shewn to be authorized by such co-proprietor, was advers. to him; *Collector of Godavery v. Addanki*, 13 I. A. 147; *S. C. sub nom., Ramalakshamma v. Ramanna*, I. L. R. 9 Mad. 482, Three co-sharers mortgaged their property. One of them R, subsequently, redeemed it: and it was held that his possession thereafter was that of a lienor, and did not amount to adverse possession against or exclusive of his co-sharers until there was an assertion of an exclusive title and submission to the right thus set up; *Ramchandra v. Sadashiv*, I. L. R. 11 Bomb. 422; following *Dadoba v. Krishna*, I. L. R. 7 Bomb. 34; and *Doe v. Hulse*, 3 B. and Cr. 755; and followed in *Bhaudin v. Shekh Ismail*, I. L. R. 11 Bomb. 425; and *Moidin v. Oothamanganni*, I. L. R. 11 Mad. 416; *Faki Abas v. Faki Nurudin*, I. L. R. 16 Bomb. 191; *Gobardhan v. Sujan*, I. L. R. 16 All. 254; but where an usufructuary mortgage has been satisfied out of the produce of the land and one of several co-mortgagees gets possession of the whole property, his possession is adverse to his co-sharers; *Gobardhan v. Sujan ubi supra*. Where the heirs of a deceased man (with the exception of the plaintiff) took possession of all his property, except so much as was mortgaged, and subsequently redeemed the mortgaged portion, and took possession of that; it was held that limitation did not run against the plaintiff as regards the mortgaged property until it was redeemed; *Umr-un-nissa v. Muhammed Yar* I. L. R. 3 All. 24. In this case Art. 144 was throughout assumed to be the Article applicable; and the question whether Art. 148 ought not to be applied was neither raised nor decided; *Nura v. Jagat Narain*, I. L. R. 8 All. 299; *Ashfaq v. Wazir Ali*, I. L. R. 14 All. 1; reported also at 11 All. 423. The interest of G in a shop belonging to G and N was purchased by S, under a deed which was not admissible in evidence because it was not registered, but S had been in possession of the shop as sole owner for more than twelve years before suit was brought: it was held that the adverse possession of S prevailed over the claim of the plaintiff who had purchased the right of G and N in the shop at an auction sale; *Sambhubhai v. Shivlaladas*, I. L. R. 4 Bomb. 89.

Where the plaintiff, who was the sister of the defendant, purchased a *paramba* jointly with him in 1877, and in 1878 went to live elsewhere, but frequently visited the *paramba* for ceremonies and festivals, and in 1888 brought a suit to recover possession of her moiety : it was held that the suit fell under this Article ; *Alima v. Kutti*, I. L. R. 14 Mad. 96.

Where a minor proprietor of land left his land in the care and possession of some collateral relatives, the permissive occupation of those relatives will continue until something occurs to make it an adverse possession, and the *onus* lies on them to shew how and when the possession ceased to be permissive and became adverse ; *Bela Sing v. Bula*, Panj. Rec. No. 94 of 1884.

Although the plaintiff's right to participate in the produce of *saranjam* villages may be acknowledged, his right to participate in the management of them may be barred, if he has been excluded from such management by the defendant for more than twelve years ; *Narayen v. Vasudeo*, I. L. R. 15 Bomb. 247.

*Mortgagors, mortgagees, and third parties.*—So long as a mortgagor, holding on after the period stipulated for in his mortgage deed, pays interest to the mortgagee, his possession is not adverse to the latter ; *Mankoo v. Sheikh Mannoo*, 14 Ben. L. R. 315 ; nor is his possession or that of those claiming under him adverse so long as they assert a title to redeem, and advance no other claim inconsistent with that title ; *Prannath v. Rookia*, 7 Moore I. A. 323 ; something positive must be done to render the friendly possession hostile ; *Vanneri v. Patanattil*, 2 Mad. H. C. Rep. 382 ; so, too, a defendant entering into possession as mortgagee cannot afterwards set up adverse possession ; *Govind v. Mahadu*, P. J. 1889, p. 311 ; following *Ali Mahomed v. Latta*, I. L. R. 1 All. 658 ; and *Tanji v. Nagamna*, 3 Mad. H. C. Rep. 137.

If a mortgagee alleges that the character of his possession has been changed by a sale to him of the property, the sale by virtue of which he claims must have been a sale valid in law, and possession under an invalid sale will not change his possession ~~in mortgage~~ into adverse possession ; *Byari v. Patanna*, I. L. R. thereof, nor in r

Where a person claiming to be entitled to the equity of redemption enters on mortgaged property, and pays the interest on the mortgage, his possession is adverse to the true owner; *Cholmondeley v. Clinton*, 2 J. and W. 1. So, too, where a person not entitled to the equity of redemption receives from the mortgagee the rent provided for in the mortgage deed, and subsequently sells the property to pay off the mortgage, the possession of the vendor and the purchaser is adverse to the true owner of the equity of redemption; *Puttappa v. Timmaji*, I. L. R. 14 Bomb. 176.

Where a mortgagee, who had obtained a decree for sale of the mortgaged property, but had not executed it, paid arrears of revenue in order to prevent a forfeiture under Sects. 56, 57 and 153 of the Land Revenue Code, and was put in possession of the property; his possession thereafter is not adverse to the mortgagor, so as to prevent the latter when execution of the decree for sale is barred, suing for redemption; *Dasharatha v. Nyahalchand*, I. L. R. 16 Bomb. 134.

The first tenant for life under a settlement mortgaged a house which belonged to him to the trustees of the settlement, he being allowed to live in it, and the rent being set-off against the income of trust funds he was intitled to under the settlement. Subsequently, the right, title, and interest of the mortgagor, in the mortgaged house, was sold in execution, and purchased by a lady who was then residing in the house, and all parties continued to reside in the house as before the sale. The mortgagor, subsequently, died. In a suit for foreclosure or sale brought against the representatives of the auction-purchaser, by the representatives of the mortgagees and the beneficiaries: it was held that limitation ran from the date of the mortgagor's death, as, under the circumstances, there could be no adverse possession against the mortgagees until that date; *Manly v. Patterson*, I. L. R. 7 Calc. 394. In this case the purchaser in execution never seems to have taken exclusive possession of the house, and at the time the suit was filed one representative of the mortgagor was actually in possession. It has, however, been ruled by the Privy

Council that, if a purchaser under a sale in execution of a decree against the mortgagor goes into possession as owner, that possession is adverse to all persons claiming under the mortgagor; and so, too, if a purchaser from the mortgagee went into possession after a sale under a decree on the mortgage, that possession would be adverse to the purchaser in execution; *Anundo Moyee v. Dhondro*, 14 *Moore I. A.* at p. 111. The former of these last two points could scarcely arise now, as, under the present procedure, incumbrances upon property attached in execution are enquired into, and the property sold subject to them, and in all cases only the right, title, and interest of the judgment-debtor at the time of sale is sold. In the latter case the purchase from the mortgagee would have the whole estate of the mortgagor transferred to him. Under special circumstances, however, cases might arise, under which the purchaser of a sale in execution might hold adversely to a mortgagor.

B obtained a *patni* lease of certain land from the *zamindar*, whose interest was subsequently sold by the Sheriff, purchased by B, and conveyed to him on the 1st April 1867. On the 13th March 1879, a suit was brought for *khas* possession against B by C, who had bought the property at a sale made in execution of a decree, dated 30th November 1865, on a mortgage made by the *zamindar*, on 11th January 1865: it was held that B's possession as *patnidar* was not adverse to C, and that, as his possession as purchaser only dated from 1st April 1867, the suit was in time; *Kasumunmissa v. Nilratna*, *I. L. R.* 8 *Calc.* 79.

A mortgagee who forecloses gets, as *absolute owner*, a new period for the starting of adverse possession against him, *viz.*, the date when the foreclosure becomes absolute; *Modun Mohun v. Ashad Ally*, *I. L. R.* 10 *Calc.* 68; *Heath v. Pugh*, 7 *App. Ca.* 235; and where the application for foreclosure has been made under Ben. Reg. XVII of 1860, limitation will not run until after the expiration of the year of grace allowed by that regulation; *Burmoye v. Dinobundhoo*, *I. L. R.* 6 *Calc.* 564; see, also, the cases in connection with mortgages cited *ante*, pp. 275, 276.

*Adopted Son.*—The rights of an adopted son only spring into existence at the time of his adoption, consequently persons in

adverse possession to a widow who subsequently adopts a son, do not commence to be in adverse possession to the adopted son until the date of his adoption; *Moro Narayen v. Balaji Raghunath*, P. J. 1894, p. 318.

*Hindu females*.—The alienation of a Hindu widow is good for her life-time, and the possession of the purchaser from her does not become adverse to the heir of her husband until her death; *Mussamut Debea v. Roy Jung*, 8 I. A. 210. Adverse possession against a widow does not count as adverse possession against the reversionary heir; *O. Atchamuna v. Subbarayudu*, 5 Mad. H. O. Rep. 428. Where a Hindu widow assumed to adopt a son to her husband, and such adopted son and afterwards his heir, the defendant, were put in possession by her of the property in dispute in the suit: it was held, in a suit to recover the property on the ground that the adoption was invalid, that the possession of the adopted son and his heir during the life-time of the widow was not adverse to the plaintiff; *Srimath v. Mahesh Chandra*, 4 Ben. L. R. F. B. 3. See, however, the notes to Art. 141, pp. 287-291 on this point.

A Hindu widow transferred certain property belonging to her deceased husband to another Hindu woman, for the express purpose of keeping up the worship of certain idols. Subsequently the estate of the transferee in such property was sold in execution of a decree against her, and the purchaser went into possession. The transferee, subsequently to such sale, died, and the widow thereupon transferred the same property to the plaintiff for the same purpose, and the plaintiff sued the purchaser for possession: it was held that the purchaser's possession did not become adverse to the plaintiff until the death of the first transferee; *Kali Das v. Kanhyalal*, 11 I. A. at p. 229. A man who takes a conveyance from a Hindu woman in the absence of her husband, and without authority from him, of land belonging to the latter, and enters into possession thereof, possesses the land adversely to the husband; *Bejoy Chunder v. Kally Prosunno*, I. L. R. 4 Cal. 327.

A Hindu widow while in possession of her husband's property for a life estate, cannot by merely asserting a proprietary title



acquire any right as against the reversionary heirs by adverse possession; *Anund Kour v. Sodi Narindun*, *Panj. Rec.* No. 83 of 1881.

*Mahommedan females.*—If a Mahommedan widow, without the consent of the other heirs of her husband, takes possession of her husband's estate in satisfaction of her dower, the other heirs of her husband cannot recover their shares after a lapse of twelve years, unless they can shew that the widow's occupancy was permissive or fiduciary; *Oomrao v. Hamid Jan*, 3 *Agra*, 279.

*Diluviation.*—In the case of successive diluviations and reformations of land, limitation runs from the time when adverse possession is taken of land re-forming on the original site, whether, at the time of the suit being brought, the land is capable of occupation or not, by reason of it lying under water in consequence of a second diluvion; *Kally Churn v. Secretary of State*, *I. L. R.* 6 *Calc.* 725.

*Pre-emption.*—A person who purchases property by the exercise of the right of pre-emption is not in a position analogous to that of an auction-purchaser in execution of a decree; because there is privity between him and the vendor, and he comes in under the vendor, and his holding is in acknowledgment of the obligations created by his vendor; *Durga Prasad v. Shambhu*, *I. L. R.* 8 *All* 86.

*Tikait Maharaj.*—The claim of a *Tikait Maharaj* to have the custody of a portrait of one of his ancestors placed in the right hands, and the conduct of his worship properly regulated falls under this Article rather than under Art. 49; *Goswami Shri Girdhariji v. Romanlalji*, *I. L. R.* 17 *Calc.* 3.

*Wakf—Sujjadanashin.*—Limitation does not run against a *sujjadanashin* until after the death of his predecessor in office; *Piran v. Abdul Karim*, *I. L. R.* 19 *Calc.*, p. 218; following *Jewan Dass v. Shah Kubeer-ood-deen*, 2 *Moore I. A.* 390.

#### Part IX.—Thirty years.

**Art. 145.** *Against a depositary or pawnee to recover moveable property deposited or pawned; thirty years from the date of the deposit or pawn.*

### Notes.

This Article is the same as Art. 147 of Act IX of 1871, but in that Act there was a clause giving a new period of limitation in the event of the depositor's right being acknowledged by the depositary, but that is now provided for by Sect. 19 of this Act.

This Article does not apply to a deposit of money with a banker to be placed to the customer's credit in account current; *Partab Sha v. Jualadin, Panj. Rec.* No. 74 of 1882.

A deposit must be of property which it is intended should be returned specifically; *Parbutty v. Ramnarain*, 11 *W. R.* 164, n.; *Radha Nath v. Bama Churn*, 25 *W. R.* 415; *Issur Chunder v. Jibun Kumari*, *I. L. R.* 16 *Calc.*, p. 29. Where a suit is brought to recover a sum of money deposited as security for the due performance of the duties of an office, there is authority for saying that the suit would fall under this Article; *Upendra v. Collector of Rajshahye*, *I. L. R.* 12 *Calc.* 113.

The Collector when he receives money from landholders as payment on account of Government revenue, the amount of which has not been determined, does not become a depositary of any amount which may eventually turn out to have been overpaid; *Gobind Chunder v. Collector of Dacca*, 11 *W. R.* 491; see, also, *Radha Nath v. Rama Churn*, 25 *W. R.* 415. The surplus sale-proceeds of property sold for arrears of revenue remaining in the hands of the Collector are not a deposit within the meaning of this Article; *Secretary of State v. Fazal Ali*, *I. L. R.* 18 *Calc.* 234; but would fall under Art. 62; over-ruled in *Secretary of State v. Guru Proshad*, *I. L. R.* 20 *Calc.* 51 (*F. B.*); *quod vide sub Art.* 120.

A suit to redeem a share of *brit jugmanka*, or the right to officiate as a priest at funeral ceremonies of Hindus, will fall under Art. 148 and not under this Article; *Raghoo Pandey v. Kassy Parey*, *I. L. R.* 10 *Calc.* 73.

**Art. 146.** *Before a Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction by a mortgagee to recover from the mortgagor the possession of immoveable property*

*mortgaged, thirty years from the date when any part of the principal or interest was last paid on account of the mortgage debt.*

### Notes.

This Article corresponds to Art. 149 of Act IX of 1871, but the period of limitation has been reduced from sixty to thirty years.

This Article only applies to cases in which some part of the principal of or interest on the mortgage has been paid, in other cases suits for possession should be brought within twelve years from the time when the mortgagor's possession becomes adverse to that of the mortgagee; *Ram Chunder v. Juggut Monmohiney*, *I. L. R. 4 Calc.* at pp. 296, 303. It will not apply to the case of a mortgagee seeking to recover possession of the mortgaged property from a purchaser from the mortgagor without notice of the mortgage, who has been openly in adverse possession for more than twelve years; *Brojonath v. Khelut Chundra*, *16 W. R. P. C.* 33; see, also, the notes to Art. 144 under the heading mortgagor and mortgagee.

Where the same person is beneficially interested in a mortgage, and also in the lands mortgaged, although the two rights are legally vested in two sets of trustees, and no payment has been made by one set to the other, but the beneficiary has been in receipt of the rents and profits of the land; that is a sufficient payment of interest to take the case out of the operation of the statute of limitations; *Topham v. Booth*, *35 Ch. D.* 607; following *Burrell v. Earl of Egremont*, *7 Beav.* 205.

### Part X.—Sixty years.

**Art. 147.** *By a mortgagee for foreclosure or sale; sixty years from the date when the money secured by the mortgage becomes due.*

### Notes.

This is an entirely new Article, but it seems to have taken the place of Art. 149 of Act IX of 1871, which is not re-enacted in the present Act, and which in form corresponded to Art. 135 of this Act, except that it applied only to suits in the High Court. It differs from Art. 135 in that all that was sought in a

suit under the former Article was the actual possession of the land under the agreement that, if the principal or interest be not paid at a certain time, the mortgagee shall be entitled to possession of the land as mortgagee, while in a suit under this Article the relief sought would be that the property be sold for the payment of the mortgage debt, or that the mortgage should be foreclosed and the mortgagee constituted absolute owner of the property.

This article applies only to mortgages, and the question to be determined in the first instance is, what is a mortgage? Under English law a mortgage is a conveyance or assignment, legal or equitable, by which the whole or part of the debtor's interest, in real or personal estate, becomes vested in the creditor on certain conditions. The Transfer of Property Act, 1882, Sect. 58 (a), defines a mortgage in much the same way, *viz.*, as "the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced," &c. The section then defines a simple mortgage, a mortgage by conditional sale, an usufructuary mortgage, and an English mortgage. Sect. 67 gives to mortgagees the right of suing either for foreclosure or for sale, but forbids the mortgagee under a simple mortgage instituting a suit for foreclosure, an usufructuary mortgagee instituting a suit for foreclosure or sale, or a mortgagee by conditional sale instituting a suit for sale. It would certainly appear, at first sight, that the only kind of mortgage excluded from the operation of this Article was an usufructuary mortgage, as neither a suit for foreclosure or sale can be brought in respect of that. Accordingly, the High Court at Allahabad has held that a suit upon a simple mortgage, *i. e.*, a bond for money payable on demand by which immoveable property was hypothecated for a debt, to recover the amount due by sale of the property, is governed by this Article; *Shib Lal v. Ganga Pershad*, *I. L. R.* 6 *All.* 551 ( *F. B.* ); but this case was dissented from by the High Court in Madras in *Aliba v. Nanu*, *I. L. R.* 9 *Mad.* 218, on the ground "that an extended technical definition given to the term 'mortgagee' by legislation, subsequent to 1877, will not also extend the period during which one, who was not technically

a mortgagee at the time of passing that Act, can sue to enforce a claim," and this Court held that a suit for such a document fell under Art. 132.

In *Sheoratan v. Mahipal*, I. L. R. 7 All. 258 (F. B.) the majority of the Court held that the Indian simple mortgage without possession was a mortgage within the contemplation of Sect. 58 of the Transfer of Property Act, and in *Motiram v. Vitai*, I. L. R. 13 Bomb. 90 (F. B.), Sargent, C. J., in delivering judgment (which was concurred in by Nanabhai, J.), approved of the case of *Shib Lal v. Ganga Pershad*, and saw no reason for holding that in Bombay such instruments have been otherwise regarded than as creating the relationship of mortgagor and mortgagee, with its ordinary correlative rights. Birdwood, J., however, while holding that the particular document sued on in the case was a mortgage, held to the view expressed by him and Jardine, J., in *Khemji v. Rama*, I. L. R. 10 Bomb. 519, that, where there was no power of entry and no right of sale except through the Court, there was no mortgage; I. L. R. 13 Bomb. p. 99. It had, however, been held long prior to this, in *Tukaram v. Khandoji*, 6 Bomb. H. C. Rep. O. C. J. 134, that a bond giving land in security was a mortgage although there was no power of sale contained therein; and Mahmood, J., in *Kishen Lal v. Ganga Ram*, I. L. R. 13 All., p. 48, points out that the Transfer of Property Act contemplates the power of sale (as well as the right of foreclosure) not being exercised except through the intervention of a Court. The case of *Motiram v. Vitai*, *ubi supra*, was followed in *Nanaji v. Pandu*, P. J. 1891, p. 16; and in *Balwantrao v. Vishnu*, P. J., 1894, p. 103.

The High Court at Calcutta, disagreeing with the Court at Allahabad, has ruled that this Article only applies to the case of an English mortgage, under which, in virtue of the contract made therein, the mortgagee's remedy is by foreclosure or sale in the alternative; *Girwar Singh v. Thakur Narain*, I. L. R. 14 Calc. 730 (F. B.); but this ruling was dissented from in the Bombay case of *Motiram v. Vitai*, *ubi sup.* It has, further, been held in Bombay that, where land is mortgaged with an express or implied power of sale if the money is not paid, a suit by the

mortgagee to have his money realized by sale of the property falls under this Article; *Govind v. Kalnak*, I. L. R. 10 Bomb. 592; *Bulakhi v. Tukaram*, I. L. R. 14 Bomb. 377. Where the owner of land gave his house as security for the payment of money borrowed, with an undertaking that if the money was not repaid then "as to the account that may be due after deducting the instalments paid, I am to sell the abovementioned security (to you) only for that sum": it was held that this clause was intended to operate as a *gahan lahan* clause, but that if the instrument was to be treated only as a simple mortgage, the case still fell under this Article; *Buvaji v. Talya*, P. J. 1891, p. 35. The High Court in Bombay has also held that a suit for foreclosure or sale in the case of an equitable mortgage by deposit of title deeds falls under this Article; *Manekji v. Rustomji*, I. L. R. 14 Bomb. 269. A document which gives fields as a *nazar gahan* (sight mortgage), and provides for their sale in default of payment, is a mortgage; *Onkar v. Goverdhan*, I. L. R. 14 Bomb. 577. The cases of *Tukaram v. Khandoji*, and *Onkar v. Goverdhan* were followed in *Venkatesh v. Narayan*, I. L. R. 15 Bomb. 183.

A suit for the money due under a mortgage deed which was one of simple mortgage with delivery of possession to the mortgagee, in which the plaintiff sought enforcement of the deed against the mortgagor, is a suit by a mortgagee for sale, although the plaintiff has not in so many words asked for a sale, and therefore falls under this article; *Gujar Mal v. Ilachi Ram*, Panj. Rec. No. 19 of 1885.

This diversity of opinion among Courts and judges will probably go on till the Privy Council determines what is meant, in this Article, by the term "mortgage," which is the point first to be determined, as by the Transfer of Property Act, a charge is a security "which does not amount to a mortgage."

The decision of the Privy Council in *Ramdin v. Kalka Pershad*, 12 I. A. 12, has, in no way, lessened the difficulties connected with this point. By that decision Art. 132 applies only to suits to realize money charged upon immoveable property out of the property itself, which is the way in which a mortgage is realized.

It has been held that money due on a mortgage is money charged on land, and there are various kinds of securities which by rulings or enactments have been held to amount to mortgages or charges upon land. Consequently, suits on mortgages, or such securities, to recover the money by sale of the land, could fall, according to the Privy Council ruling, under the terms of Art. 132. The present Article, however, provides a limitation of sixty years for a suit by a mortgagee for the sale of the mortgaged property, and the question then necessary to be determined is, what form of document will fall under the term mortgage, and so get the benefit of this Article, and what form amounts only to a charge and must be enforced within twelve years under Art. 132; and on this point, as the preceding cases will have shewn, the Courts in India are not in accord.

Where a mortgagee under a conditional sale is put in possession and subsequently ousted, the fact that he remains for more than twelve years out of possession, does not prevent him from suing for foreclosure or sale under this article; *Amanna v. Gurumurthi*, I. L. R. 16 Mad. 64.

A Division Court at Calcutta has ruled that a suit against a purchaser from a mortgagor after the date of the mortgage, by the mortgagee, who has obtained a mortgage decree in a suit to which the purchaser was not a party, to enforce his rights against the property in the hands of the purchaser, falls under this Article and not under Art. 132; *Brojo Lall v. Gour Charan*, I. L. R. 12 Calc. 111. In this case it does not appear whether the purchaser took without notice of the mortgage, and the provisions of Art. 144 were not referred to, nor was the Privy Council case of *Brojanath v. Khilatchandra*, referred to in the notes to that Article, cited. In the subsequent case of *Shurnomoyee v. Srinath Das*, I. L. R. 12 Calc. 614, the Privy Council case was followed; and it was pointed out that this Article could not apply to mortgages in the mofussil of Bengal, because of the express provisions of Reg. XVII of 1806, and that, consequently, the only Article applicable to such mortgages was Art. 135. Reg. XVII of 1806 has been repealed by the Transfer of Property Act, 1882; consequently, mortgages in the mofussil of Bengal are now governed by the

provisions of that Act ; but the bestowal of the right of foreclosure by that Act does not enable a mortgagee to sue for foreclosure in respect of any property, the right to recover which was barred under Art. 135 before the Transfer of Property Act came into force ; *Srinath v. Khettermohun*, 16 I. A. 85.

**Art. 148.** *Against a mortgagee to redeem or to recover possession of immoveable property mortgaged ; sixty years from the date when the right to redeem or to recover possession accrues. Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.*

### Notes.

This Article corresponds to Art. 148 of Act IX of 1871, but it has been extended to suits to *redeem*, as well as to recover possession of, mortgaged property, and limitation under the former Act ran from the date of the mortgage. There was also a provision regarding acknowledgment by the mortgagee of the title of the mortgagor, but that is now provided for by Sect. 19.

The term "mortgagee" includes the assignee of a mortgagee ; *Bhagwan v. Bhagwan*, I. L. R. 9 All., p. 102.

A mortgagor suing to redeem must prove the mortgage which he desires to redeem, and his right to redeem it at the time of suit brought (unless it is admitted by the defendant), in the same way as any other plaintiff must prove his case to enable him to maintain his suit ; *Parmanand v. Sahib Ali*, I. L. R. 11 All. 438 (F. B.), and the cases cited and discussed therein. When once a mortgage is proved, the mortgagee cannot by denying the plaintiff's title compel him to come into Court within twelve years to prove it ; *Tejumaal v. Zulfikar*, Panj. Rec. No. 49 of 1882.

This Article applies only to suits against persons claiming under the mortgagee, except purchasers for value, but not to suits against strangers, nor to suits which are not suits for redemption ;



*Ammu v. Ramkrishna*, I. L. R. 2 Mad. 228; and to those for possession or redemption, or because the amount secured by the mortgage has been paid or worked off. For a contrary ruling as to suits against strangers, see *Vithoba v. Gangaram*, 12 Bomb. H. C. Rep. 180; see, also, the notes to Art. 144. In 1866, S obtained a decree declaring him entitled to redeem certain property and recover possession thereof on payment of a certain sum, but not declaring that S should be foreclosed if he did not redeem within a fixed time: it was held that S was not debarred from bringing a suit in 1881 to redeem the property; *Sami v. Somasundram*, I. L. R. 6 Mad. 119; but see *Hari Ravji v. Shapurjee Hormusjee*, 13 I. A. 66.

The right to redeem and the right to foreclose are co-extensive; *Sakharam v. Vithul*, 2 Bomb. H. C. Rep. A. C. J. 225; *Lila v. Vasudev*, 11 Bomb. H. C. Rep. 283; *Brown v. Cole*, 14 Sim. 427; and unless it is specially so provided in the mortgage deed, the mortgagor cannot redeem before the time when the mortgagee can foreclose; *Vadju v. Vadju*, I. L. R. 5 Bomb. 22; in which case it was held that where a mortgage deed stipulated that the debt was to be paid *within* ten years, the mortgagor could not redeem till the ten years had expired.

The purchaser of the equity of redemption of part of an estate under mortgage is entitled to redeem the whole estate if the mortgagee requires it; and he then will stand to the mortgagor in the place of the mortgagee, so far as the other part of the property is concerned; *Asansab v. Vamana*, I. L. R. 2 Mad. 223; and one of two co-mortgagors redeeming the whole property would stand in the same position to the other co-mortgagor, and a suit by the latter to redeem his share from the former would fall under this Article; *Nura Bibi v. Jagat Narain*, I. L. R. 8 All. 295; followed in *Ashfaq v. Wazir Ali*, I. L. R. 14 All. 1 (F. B.); and the other co-mortgagor must bring his suit for redemption within sixty years from the date when the right to redeem first accrued, and not from the date when the co-mortgagor redeemed the property; *Ashfaq Ahmed v. Wazir Ali*, I. L. R. 11 All. 423 (F. B.).

The mere assertion of an adverse title by a mortgagee in possession does not abbreviate the period of limitation provided by this Article, and the fact that he has purported to buy the equity of redemption from a person who had no title to sell it, does not prevent the mortgagor from suing for redemption, although more than twelve years have elapsed since the alleged sale; *Ali Muhammad v. Lalla*, *I. L. R.* 1 *All.* 655; *Tanji v. Nagamma*, 3 *Mad. H. C. Rep.* 137; *Sheopal v. Khadim*, 7 *N. W.* 220; *Bhagvant v. Kondi*, *I. L. R.* 14 *Bomb.* 279.

A demise to the defendant of a village for fourteen years to pay off a debt, the defendant being bound to account for his receipts, amounts to a mortgage, and a suit to recover the mortgaged property falls under this Article; *Chudasama v. Ishwargar*, *P. J.* 1883, p. 145; a suit to redeem a share of the right to officiate as a priest at Hindu funerals falls under this Article; *Raghoo Pandey v. Kassy Parey*, *I. L. R.* 10 *Calc.* 73. In Bombay, a *gahan lahan* clause, or stipulation for sale, conditional on default of payment, does not operate as a sale, but the instrument remains a mortgage, and a suit to redeem it falls under this Article; *Shankarbai v. Kassibhai*, 9 *Bomb. H. C. Rep.* 69; *Krishnaji v. Ravi*, *ib.* 79.

Where a decree for redemption of mortgaged property has been obtained in the Mofussil, and the mortgagor omits to execute it by paying the amount found to be due within three years, he is foreclosed of his equity of redemption; *Maloji v. Sagaji*, *I. L. R.* 13 *Bomb.* 567; following *Gan Sawant v. Narayan*, *I. L. R.* 7 *Bomb.* 467, which, however, was dissented from in *Karuthasami v. Jaganatha*, *I. L. R.* 8 *Mad.* 479; and both disapproved of in *Narayan v. Anandram*, *I. L. R.* 16 *Bomb.* 480.

Where after the expiration of the period prescribed in a mortgage for redemption, the mortgagor and mortgagee agreed that the latter should continue in absolute possession of the property for a term of years, and then restore it free from his mortgage lien: it was held that this agreement was not a mortgage, and that a suit to recover the property must be brought within twelve years from the expiry of the term; *Gopal Sitaram v*

*Desai*, I. L. R. 6 Bomb. 674; followed by the High Court, Bombay, *Abesing v. Jasvatsing*, on the 4th October 1882.

Interest on money lent on mortgage is recoverable so long as the remedies on the mortgage itself are not barred by limitation; *Daudbhai v. Daudbhai*, I. L. R. 14 Bomb. 113; following *Prabhakar v. Pandurang*, 12 Bomb. H. C. Rep. 88.

**Art. 149.** *Any suit by or on behalf of the Secretary of State for India in Council; sixty years from the date when the period of limitation would begin to run under this Act against a like suit by a private person.*

### Notes.

This Article corresponds to Art. 150 of Act IX of 1871, but the words "by or on behalf" have been substituted for "in the name," and in that Article the period of limitation ran from the date "when the right to sue accrued."

The alteration from "in the name of" to "by or on behalf of" is important, because persons may bring suits for their own benefit in the names of others, under certain conditions, and a suit so brought in the name of the Secretary of State by a private person for his own benefit would have fallen under Art. 150 of Act IX of 1871, consequently that Act made a change in the law as it was under Act XIV of 1859, from the operation of which Act public claims only were excepted; see *Assoo v. Rajoo*, 10 W. R. 76. The present Article applies only to suits which are brought for the benefit or on behalf of Government, and it would seem as if it was not necessary that the suit should be actually in the name of the Secretary of State. In *Koylashbasing v. Gocoolmoni*, I. L. R. 8 Calc., pp. 235, 236, there is, however, a dictum to the effect that Government, or an auction-purchaser claiming under Government, would have sixty years to sue for the resumption of *lakhiraj* land.

In a suit by the Crown for ejectment, or declaration of title, the Crown under this Article must shew possession of the proprietary rights claimed within sixty years, or if the defendants prove possession, it is incumbent on the Crown to shew that that

possession commenced, or became adverse, within that period ; *Secretary of State v. Vira Rayan*, I. L. R. 9 Mad. 175.

Where the title of the Crown is derived from a subject, the Crown takes only such rights as were in the assignor at the time of assignment, and if a claim be barred as against the assignor, it is barred as against the Crown, and the Crown cannot take advantage of the longer period of limitation allowed to it ; *The King v. Morraill*, 6 Price, 24.

A purchaser at a sale of a Government *khas mehal* does not acquire any different right from that of any other proprietor ; nor does the fact of his purchasing from Government give him sixty years within which to bring a suit for possession, nor any further time than is allowed to any other purchaser by the ordinary law of limitation ; *Hossein Buksh v. Ameena*, 20 W. R. 231 ; *Boondi Roy v. Pandit Bunsu*, 24 W. R. 64. There may be an adverse possession *in fact* against the Crown, and if a subject in England purchases land from the Crown, on which another has been in adverse possession for twenty years, he cannot sue in ejectment to obtain possession of the land in occupation of the adverse possessor, although the Crown would not be barred ; *Doe v. Watt*, 2 Scott, 276.

A person who claimed as lessee under Government could not escape from the provisions of Act XIV of 1859 as to limitation ; *Asso v. Rajoo*, 10 W. R. 76 ; much less can he avail himself of the provisions of this Article.

A *mutavalli*, since the passing of Act XX of 1863, has not the position of an officer of Government, as was held in *Jewan v. Shah Kubeer*, 6 W. R. P. C. 3, and is, therefore, bound by the ordinary law of limitation ; *Shaikh Laul v. Lalla Brij*, 17 W. R. 430.

A dispute between two private owners of *khas mehals* cannot divest the title of either of them to possession in favour of Government, if the Government is only entitled to a *jumma* ; and if one owner has been dispossessed by the other, and has allowed his title to become barred, he cannot get an extension of time by inducing the Collector to join him in suing for possession

*Gunga Govind v. Collector of the 24-Pergunnahs*, 7 W. R. P. C. 21; *S. O. 11 Moore I. A.* 363.

This Article applies only to suits, and the legislature having further, in Art. 157, provided a period of limitation for appeals by the Crown against acquittals, the Crown will be bound by all the other provisions of this schedule as to appeals and applications; *Appaya v. Collector of Vizagapatam*, I. L. R. 4 Mad. 155; *Govind Laksman v. Narayen*, 11 Bomb. H. C. Rep. 111; *Venubai v. Collector of Nusik*, I. L. R. 7 Bomb. 552, n.

Under the *Bhagdari Act V. of 1862 (Bo.)*, there is no limitation to an application by the Collector to set aside an unauthorized sale of a *bhag*, and this Act providing none, either under this Article or under Art. 178, there is no limitation provided for such an application; *Collector of Broach v. Raghunath*, I. L. R. 7 Bomb. 546; which goes beyond the case of *Collector of Broach v. Rajaram Laldas*, *ib.* 542. In the latter case it was suggested that Art. 178 might apply, which the Court answered by pointing out that knowledge of the facts which entitled the Collector to make the application had been fraudulently kept from him, and, consequently, under the provisions of Sect. 18 of this Act, he was in time even under Art. 178. Art. 178 applies to *all* applications to a Court not otherwise provided for, and if the Legislature desired to exclude applications under the *Bhagdari Act* from its operations, it would have been easy to say so in so many words. See, however, the case of *Manekbai v. Manekji*, I. L. R. 7 Bomb. 213, in the notes to Art. 178.

#### SECOND DIVISION APPEALS.

**Art. 150.** *Under the Code of Criminal Procedure from a sentence of death passed by a Sessions Judge; seven days from the date of the sentence.*

#### Notes.

This Article is new, this case not having been specially provided for in Act IX of 1871, but by the Criminal Procedure Code

for the time being. Presentation of an appeal by a prisoner in jail to the jailor is equivalent to presentation to the Court; *Emp. v. Lingaya*, I. L. R. 9 Mad. 251.

**Art. 151.** *From a decree or order of any of the High Courts of Judicature at Fort William, Madras and Bombay, or the Chief Court of the Punjab \* in the exercise of its original jurisdiction; twenty days from the date of the decree or order.*

### Notes.

This Article is new, the time for the presenting of such appeals having been provided for by rules of the High Courts.

See Sect. 12 and the notes thereon.

**Art. 152.** *Under the Code of Civil Procedure, to the Court of a District Judge; thirty days from the date of the decree or order appealed against.*

**Art. 153.** *Under the same Code, Section 601, to a High Court; thirty days from the date of the order refusing the certificate.*

### Notes.

Art. 152 is the same as Art. 151 of Act IX of 1871, except that the words "or order" have been added. Art. 153 is new, having been provided for in Act VI of 1874, regulating the procedure in Indian appeals to the Privy Council, and subsequently by the Civil Procedure Code of 1877, and the certificate referred to therein is the certificate of the Court by which a suit has been tried that it comes within the requirements of the Code for Appeals to the Privy Council.

Where an application has been made to review a decree, and the decree has been varied, even though it be in favour of the appellant, the date of the decree is the date when its form was finally settled, not the date of the decree in respect of which the application for review was made; *Joykissen v. Ataoor*, I. L. R. 6 Cal. 22.

**Art. 154.** *Under the Code of Criminal Procedure, to any Court other than a High Court; thirty days from the date of the sentence or order appealed against.*

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\* These words were inserted by Act XVII of 1877, Sect. 18.

**Art. 155.** *Under the same Code, to a High Court, except in the cases provided for by No. 150 and No. 157; sixty days from the date of the sentence or order appealed against.*

#### Notes.

These Articles are both new.

In computing the period of limitation under these Articles, the time occupied in forwarding an application by a prisoner for a copy of the judgment, and in transmitting the same to the jail must be excluded; *Emp. v. Lingaya*, I. L. R. 9 Mad. 258; *Ghamman v. Emp.*, Panj. Rec. No. 5 of 1888, cr.

**Art. 156.** *Under the Code of Civil Procedure, to a High Court, except in the cases provided for by No. 151 and No. 153; ninety days from the date of the decree or order appealed against.*

#### Notes.

This Article corresponds to Art. 154 of Act IX of 1871; but the exception is an addition. Art. 151 applies to appeals from the original jurisdiction of the High Court; and Art. 153 to the refusal of certificates in appeals to the Privy Council by Courts other than the High Courts.

Under the Supplement to the Bombay Municipal Act, Act XXI of 1888, Sect. 5, an appeal to the High Court of Judicature at Bombay, under Sect. 3 or 4 of this Act, is to be deemed to fall under this Article. By Act VII of 1889, Sect. 19, appeals from a District Judge granting, refusing, or revoking a certificate under the Succession Certificate Act, 1889, fall under this Article.

In a suit for pre-emption, where a decree was made subject to the payment of a sum of money into Court within a certain time: it was held that the decree did not become final till the expiry of that time; *Shaikh Ewaz v. Mokuna*, I. L. R. 1 All. 132; and if that time expires while the Court is closed for the vacation, the decree does not become final till the Court re-opens; *Ram Sahai v. Gaya*, I. L. R. 7 All. 107; and that limitation for appealing runs from the date at which the decree becomes final; *Mirza Himmud v. Govindo*, 5 W. R. 91.

An appeal from the Court of the Recorder at Rangoon to the High Court at Calcutta is an appeal under the Civ. P. C., and must be made within the time prescribed by this Article; *Aga Mahomed v. Cohen*, I. L. R. 13 Calc. 221.

A second appeal under Sect. 27 of the Burma Courts Act, 1875, is not subject to the limitation provided by this Article, or any other Article in this schedule, but its reception is left to the unfettered discretion of the Judicial Commissioner; *Mahomed Hossein v. Inodeen*, I. L. R. 10 Calc. 946.

**Art. 157.** *Under the Code of Criminal Procedure, from a judgment of acquittal; six months from the date of the judgment appealed against.*

#### **Note.**

This Article is new. The period within which the appeal was to be brought was formerly fixed by the Code of Criminal Procedure.

#### **THIRD DIVISION. APPLICATIONS.**

**Art. 158.** *Under the Code of Civil Procedure, to set aside an award; ten days from the date when the award is submitted to the Court.*

#### **Notes.**

This Article corresponds to Art. 155 of Act IX of 1871, but the words "and notice of the submission has been given to the persons, and in the manner prescribed by the High Court," have been omitted.

Sect. 576 of the Civil Procedure Code provides for the filing of the award in Court, and the Bombay High Court rules provide (Rule 155) that, after filing, either party may on notice to the other *submit* the award to a Judge in Chambers. The rules do not state and, I believe, neither Judges nor Bar know for certain, what is to be done on such submission, because, as a matter of fact, no application is ever made at that time, and it would appear as if it was simply intended as a means of fixing the com-



mencement of the period of limitation. It may, however, be remarked that when an award is filed in Court, it is really submitted to the Court, because thereafter it is in the possession and power of the Court, and where there are no rules for the subsequent submission to the Court, it must be taken that the award is submitted when filed. In Act VIII of 1859, Sect. 320, the word "submit" is used instead of the word "file."

The words "set aside" refer only to setting *aside in toto*, and there is no limitation to the time within which a Court can modify or correct an award; *per Farran, J., in Canji Anunji v. Janabai*, 8th September 1887. Sect. 522, C. P. C., only mentions "application" in reference to setting aside an award, the grounds for which appear in Sect. 521, but does not use that term with reference to modifying, correcting or remitting an award; see, also, *Muhammad v. Muhammad*, I. L. R. 8 All. 64.

**Art. 159.** *For leave to appear and defend a suit under Chapter XXXIX of the Code of Civil Procedure; ten days from the date when the summons is served.*

### Notes.

This Article is new, its provisions having previously been contained in Act V of 1886, which provided a summary procedure for suits on negotiable instruments.

**Art. 160.** *For an order under Section 629 of the same Code restoring to the file a rejected application for review; fifteen days from the date when the application for review is rejected.*

### Note.

This Article is new.

**Art. 160 A.** *For a review of judgment by a Provincial Court of Small Causes, by a Court invested with the jurisdiction of a Provincial Court of Small Causes; fifteen days from the date of the decree or order.*

### Note.

This Article was introduced by Act IX of 1887, Sect. 36.

**Art. 161.** This Article now appears as Art. 173A.

**Art. 162.** *For a review of judgment by any of the High Courts of Judicature at Fort William, Madras and Bombay, or the Chief Court of the Punjab,\* in the exercise of its original jurisdiction; twenty days from the date of the decree or order.*

#### Note.

This Article is new, the time for an application for a review was previously fixed by rules of the High Courts at Calcutta, Madras and Bombay.

**Art. 163.** *By a plaintiff, for an order to set aside a dismissal by default; thirty days from the date of the dismissal.*

#### Notes.

This Article corresponds with Art. 156 of Act IX of 1871, but the word "dismissal" has been substituted for "judgment," the former being the word used in the Civil Procedure Code. It applies to applications under Sects. 99 and 103 in respect to suits dismissed under Sects. 97, 98 and 102 of the Code.

Act VII of 1888, Sect. 381, makes this Article applicable to an application to set aside a dismissal of a suit under that section and to an appeal from an order rejecting such application, in the cases provided for by that Section of the C. P. C. as amended by that Act.

**Art. 164.** *By a defendant, for an order to set aside a judgment ex parte; thirty days from the date of executing any process for enforcing the judgment.*

#### Notes.

This Article is the same as Art. 157 of Act IX of 1871.

The defendant can, at any time after an *ex parte* decree has been passed against him, apply to have it set aside, but limitation does not begin to run until there has been actual execution of the decree.

An application to set aside an *ex parte* decree in a Presidency Small Cause Court falls under this Article, *Roshanlal v. Luchmi*, I. L. R. 17 Bomb. 507.

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\* Inserted by Act VII of 1877, Sect. 18.

Where a defendant has appeared at the first hearing of a suit, but fails to appear at the adjourned hearing, and a decree is passed against him; that is not an *ex parte* decree within the meaning of Sect. 108 C. P.C.; *Sital Hari v. Heera Lal*, I. L. R. 21 Calc. 269; following *Sahibzada v. Sahibzada*, 5 I. A. 233; I. L. R. 2 All 67.

The date of executing any process for enforcing the judgment is the date on which any process for attachment of the judgment-debtor's property or person is actually executed; not the date on which notice is issued calling upon him to show cause why the decree should not be executed; *Pooroo v. Prosonno*, I. L. R. 2 Calc. 123; application must be made thirty days after attachment, and not after the proclamation of sale; *Bhaobunnessury v. Judobendra*, I. L. R. 9 Calc. 869; nor from date of sale; *Har Prasad v. Jafar Ali*, I. L. R. 7 All. 345. Where a joint decree is passed against two defendants who live in different villages, and the decree is executed against one defendant, such execution cannot be said to be execution of process against the other, so as to compel him to come in within thirty days from the date of the execution of such process; *Karji v. Ramji*, P. J. 1888, p. 56.

Where S had been granted a certificate under Act XL of 1858 and had taken possession of property thereunder, and such certificate was subsequently revoked by an *ex parte* order which required S to deliver up the said property to A, and a precept requiring S so to do was duly served upon her: it was held that the precept was process for enforcing the order, and that S must apply to set aside the order within thirty days from the time the precept was served upon her; *Sunkaj v. Ambika*, I. L. R. 6 All. 144.

**Art. 165.** *Under the Code of Civil Procedure, by a person dispossessed of immoveable property, and disputing the right of the decree-holder or purchaser at a sale in execution of a decree to be put into possession; thirty days from the date of the dispossession.*

### Notes.

This Article corresponds to Art. 158 of Act IX of 1871, but the words "or purchaser at a sale in execution of a decree" have been added.

When an auction-sale in execution of a decree has been confirmed and the purchaser put into possession, no application to oust him can be made under any circumstances not provided for by this Act, after the expiry of thirty days from the date on which, by his being put in possession, the applicant was dispossessed; *Mahomed Hosein v. Kokil Singh*, I. L. R. 7 Calc. 91.

**Art. 166.** *To set aside a sale in execution of a decree, on the ground of irregularity in publishing or conducting the sale, or on the ground that the decree-holder has purchased without the permission of the Court; thirty days from the date of the sale.*

### Notes.

This Article corresponds to Art. 159 of Act IX of 1871, but the words "or on the ground that the decree-holder has purchased without the permission of the Court" have been added.

This Article applies only to applications made under Sects. 294 and 311 of the Civil Procedure Code, seeking to set aside a sale on the ground of material irregularity in publishing or conducting a sale, or on the ground that the decree-holder has purchased without the permission of the Court. It does not apply to an application to set aside a sale, made in fraud of an agreement between the judgment-debtor and the decree-holder, which sale was fraudulently kept from the knowledge of the judgment-debtor; *Sakharam v. Damodhur*, I. L. R. 9 Bomb. 468.

When once a sale has been confirmed under Sect. 312, C. P. C., no application to set it aside under Sect. 311 can be entertained, although it is alleged that the sale was fraudulently kept from the knowledge of the applicant; but if, before confirmation, but after thirty days from the sale an application is made alleging such fraud, then the application may be entertained under Sect. 18 of this Act if the fraud be made out; *Gobind Chunder v. Uma Charan*, I. L. R. 14 Calc. 679.

**Art. 167.** *Complaining of resistance or obstruction to delivery of possession of immoveable property decreed or sold in execution of a decree, or of dispossession in the delivery of possession to the decree-holder or the purchaser of such property; thirty days from the date of the resistance, obstruction or dispossession.*

### Notes.

This Article corresponds to Art. 160 of Act IX of 1871, but the words "decreed" and "to the decree-holder" have been inserted in this Article.

This Article applies to applications under Sect. 328 of the Civil Procedure Code. Where a warrant for possession of land was not executed owing to the resistance of the judgment-debtor in September 1880, and no application was then made to the Court, but a fresh warrant was subsequently issued, and resistance to its execution was made in January, 1881: it was held that an application to the Court within thirty days from the second resistance was within time; *Ramasekara v. Dhurmaraya*, *I. L. R.* 5 *Mad.* 118.

A decree-holder is not obliged to make an application under Sect. 328, Civ. P. C., 1882, but may proceed by suit; *Bulwant v. Babaji*, *I. L. R.* 8 *Bomb.* 602; *Damodar v. Gokal*, *I. L. R.* 7 *All.* at p. 91; *Muttia v. Appasami*, *I. L. R.* 13 *Mad.* 504; and if he makes no application within the thirty days, his only remedy is by suit; *Shoteenath v. Obhoy*, *I. L. R.* 5 *Calc.* 331. A purchaser, also, need not make an application under Sect. 335; *Sevu v. Muttusami*, *I. L. R.* 10 *Mad.* 53.

Where a decree-holder tries to obtain possession of land to which he is entitled under his decree, and is obstructed, and his application is, under Sect. 331, Civ. P. C., tried as a suit, the period of limitation will be governed by Art. 144, and not by Art. 122; *Haribhai v. Balajee*, *P. J.* 1885, p. 196; *Namdev v. Gomaji*, *I. L. R.* 18 *Bomb.* 37.

A minor who attains his majority after obstruction occurs in respect of property which he has purchased, must make his application within one month of his attaining his majority; *Vinayekrav v. Devrav*, *I. L. R.* 11 *Bomb.* 473.

**Art. 168.** *For re-admission of an appeal dismissed for want of prosecution; thirty days from the date of the dismissal.*

### Notes.

This Article is the same as Art. 161 of Act IX of 1871; and applies to applications under Sect. 558, Civ. P. C.

**Art. 169.** *For a re-hearing of an appeal heard ex parte in the absence of the respondent; thirty days from the date of the decree in appeal.*

**Note.**

This Article did not appear in Act IX of 1871. It applies to applications under Sect. 560, Civ. P. C., 1882.

The Court has no power to extend the time given under this article; *Sher v. Mohan Singh, Panj. Rec. No. 66 of 1885.*

**Art. 170.** *For leave to appeal as a pauper; thirty days from the date of the decree appealed against.*

**Notes.**

This Article corresponds to Art. 162 of Act IX of 1871, but under that Act the period of limitation was ninety days.

This Article applies to applications under Sect. 592, Civ. P. C. If after making allowance for the day on which judgment is pronounced, and the time requisite for obtaining a copy of the decree the applicant is still out of time, the Court cannot act under Sect. 5 of this Act, and excuse the delay, although reasonably accounted for; *Lakshmi v. Ananta, I. L. R. 2 Mad. 230; Parbati v. Bhola, I. L. R. 12 All. 79.*

Although thirty days are allowed to apply for leave to appeal as a pauper, it must be remembered that, on the original side of the High Courts, twenty days only are allowed for the filing of the appeal; and as the petition would be taken as the memorandum of appeal if it is granted, it would seem that a petition for leave to appeal from a decree on the original side of the High Courts should be filed within twenty days from the date of the decree appealed against.

**Art. 171.** *Under Section 371 of the Code of Civil Procedure or under that Section and Section 582, for an order to set aside an order for abatement or dismissal; sixty days from the date of the order for abatement or dismissal.*

**Notes.**

This article did not appear in Act IX of 1871, and was introduced into this Act by Act XII of 1879, as Art. 171C, and was

amended and numbered Art. 171 by Act VII of 1888, Sect. 66. It applies to an application by the *representative* of a deceased, bankrupt, or insolvent plaintiff to set aside an order of dismissal or abatement made under Chap. XXI of the Civ. P. C., 1882; or of an appeal under Sect. 582.

This article overrules the decision in *Bhoyrub v. Doman*, I. L. R. 5 Calc. 139 : in which it was held that an application under Sect. 371, Civ. P. C., fell under Art. 178.

**Art. 172.** *By a purchaser at an execution-sale, to set aside the sale on the ground that the person whose interest in the property purported to be sold had no saleable interest therein; sixty days from the date of the sale.*

#### Notes.

This article did not appear in Act IX of 1871. It applies to applications under Sect. 313, Civ. P. C., made by the *purchaser* of property at an execution-sale.

A judgment-debtor has a saleable interest in property belonging to him, although it is mortgaged to its full estimated value; *Sant Lal v. Ramji Das*, I. L. R. 9 All. 167; in which *Naharmul v. Sadut Ali*, 8 C. L. R. 468, was distinguished, and *Pratap v. Panioty*, I. L. R. 9 Calc. 506, was referred to.

**Art. 173.** *For a review of judgment, except in the cases provided for by Nos. 160 A and 162; ninety days from the date of the decree or order.*

#### Notes.

This article corresponds to Art. 164 of Act IX of 1871, and the exception is inserted because reviews of judgments of the High Courts on the Original Side and of Provincial Courts of Small Causes are now provided for by this Act.

**Art. 173A.** *For the issue of a notice under Section 258 of the same Code, to shew cause why the payment or adjustment therein mentioned should not be recorded as certified; ninety days from the date when the payment or adjustment is made.*

**Note.**

This Article originally appeared as Art. 161, and the limitation was then twenty days, but by Act VII of 1888, Sect. 66, the time was extended to ninety days, and the Article numbered 173A.

**Art. 174.** *By a creditor of an insolvent judgment-debtor, under Section 353 of the Code of Civil Procedure; ninety days from the date of the publication of the schedule.*

**Notes.**

This article does not appear in Act IX of 1871. Its provisions appeared for the first time in the Civil Procedure Code, 1877. It only applies to applications by creditors, where a schedule has been framed, and the name of the applicant has been omitted therefrom. If no schedule has been framed, the time for application will be within three years from the date of declaration of insolvency, under Art. 178; *Parshadi v. Chunni Lal*, I. L. R. 6 All. 142.

**Art. 175.** *For payment of the amount of a decree by instalments; six months from the date of the decree.*

**Notes.**

This Article does not appear in Act IX of 1871. It applies to applications by judgment-debtors under Sect. 210, Civ. P. C., and a period of limitation for such applications was first provided by this Article.

**Art. 175A.** *Under section 365 of the Code of Civil Procedure, by the legal representative of a deceased plaintiff or under that section and Sect. 582 of the same Code by the legal representative of a deceased plaintiff-appellant or defendant-appellant; six months from the date of the death of the deceased plaintiff or of the deceased plaintiff-appellant or defendant-appellant.*

**Notes.**

This Article does not appear in Act IX of 1871, but appeared originally as Art. 171 in the present Act when it applied only to



representatives of deceased plaintiffs, under Sects. 363 and 365, C. P. C.; subsequently, Act XII of 1879 extended its application to the representatives of deceased appellants; Act VII of 1888, Sect. 66, altered its number to 175A and gave it its present form and extended the time from sixty days to six months. It applies only to an application by the representatives of a deceased plaintiff or appellant to have their name entered on the record in the place of his. It does not apply to an application by the surviving co-plaintiffs; nor to an application by a defendant, under Sect. 366, which is provided for by the next Article.

This Article applies only to applications in suits or appeals made before decree, under Sect. 365, Civ. P. C.; it does not apply to the representative of a deceased judgment-creditor claiming admission to continue proceedings commenced by him, as such proceedings do not abate by the death of the judgment-creditor; *Ramanada v. Minatchi*, I. L. R. 3 Mad. 236; *Gulubdas v. Lakshman*, I. L. R. 3 Bomb. 221; followed in *Dulari v. Mohan Singh*, I. L. R. 3 All. 759; but *quære* whether it applies to representatives of a plaintiff coming in to appeal, the plaintiff having died after the decree was passed; see *Ramanada v. Minatchi*, *ubi sup.*; and in its present form it overrules the case of *In re Ram Sunker*, 3 C. L. R. 440.

An application made on behalf of minor sons of a deceased appellant that their names be entered on the record in the place of that of the deceased appellant is within time, although the time limited by this article has expired, no final order having been passed at the date of the application in respect of the appeal, *Sarwar Jan v. Dina*, Panj. Rec. No. 103 of 1881; *Rihana v. Harditta*, *ib.* No. 91 of 1885.

The omission of Sect. 363 from this Article as it now stands will cause the case of the decease of one out of a number of plaintiffs to fall under Art. 178.

**Art. 175B.** *Under Section 366 of the Code of Civil Procedure, by a defendant, or under that section and Section 582 of the same Code by a plaintiff-respondent or defendant-respondent; six months from the date of the death of the deceased plaintiff, or of the deceased defendant-appellant or plaintiff-appellant.*

**Notes.**

This Article does not appear in Act IX of 1871, and was introduced into the present Act by Act XII of 1879 as Article 171A. It then applied to an application by a defendant in a suit, in which the *sole* plaintiff had died and his legal representative had not been made a party within sixty days from the date of the plaintiff's death, that the suit might abate and that the defendant might have his costs out of the estate of the deceased plaintiff, or for such other order as to bringing in the representative of the deceased plaintiff as the Court might think fit. In its present state as amended by Act VII of 1888, Sect. 66, it applies also to the case of the death of an appellant. The time, also, is extended from sixty days to six months.

**Art. 175C.** *Under Section 368 of the Code of Civil Procedure, to have the legal representative of a deceased defendant made a defendant, or under that section and Section 582 of the same Code to have the legal representative of a deceased plaintiff-respondent or defendant-respondent made a plaintiff-respondent or defendant-respondent; six months from the date of the death of the deceased defendant, or of the deceased plaintiff-respondent or defendant-respondent.*

**Notes.**

This Article does not appear in Act IX of 1871, and was introduced into this Act by Act XII of 1879 as Art. 171B. It then applied to applications by a plaintiff to have the representatives of a deceased defendant made parties to a suit. In its present state as amended by Act VII of 1888, Sect. 66, it applies to the case of the death of defendants and respondents, and the time has been extended from sixty days to six months. Sect. 368 of the Civ. P. C. provides that if the representatives be not made parties within the six months, the suit shall abate, *unless the plaintiff satisfies the Court that he had sufficient cause for the delay.*

Under Sect. 368 this Article will also apply to an application by the legal representative of a deceased defendant or respondent to have himself made defendant or respondent in the place of the deceased defendant or respondent.

Ignorance by an appellant of the fact of the respondent's death may be sufficient cause for not making the proper application within the time limited; *Gaman v. Baksha*, *Panj. Rec.* No. 42 of 1887.

The present Article does away with the effect of all the cases deciding that the word "defendant" does not include a respondent; *Udit Narain v. Harogouri*, *I. L. R.* 12 *Calc.* 590 (*F. B.*); overruling *Soshi v. Grish Chunder*, *I. L. R.* 11 *Calc.* 694; and following *Narain Das v. Laljee Ram*, *I. L. R.* 7 *All.* 693 (*F. B.*); *Lakshmi v. Sri Devi*, *I. L. R.* 9 *Mad.* 1 (*F. B.*); *Balkrishna v. Bal Joshi*, *I. L. R.* 10 *Bomb.* 663. It, also, renders unnecessary the case of *Baldeo v. Bismillah*, *I. L. R.* 9 *All.* 118, in which it was decided that where a defendant was also respondent the Article in its former state applied.

This Article, in its present form, also, does away with the rulings that where a defendant-appellant, or plaintiff-appellant desires to bring on the record the legal representative of a deceased plaintiff-respondent or defendant-respondent, Art. 178 applies; *Chajmal Das v. Jagdamba*, *I. L. R.* 10 *All.* 260; *Debi Din v. Chunna Lal*, *ib.* 264.

Any application made for the adding of representatives after the 1st July 1883, must be made within six months of the death of the deceased party; *Chajmal Das v. Jagdamba*, *I. L. R.* 11 *All.* 408.

This Article only applies to applications made in suits, and not to applications of the nature mentioned in Sect. 368, *Civ. P. C.*, when made in miscellaneous proceedings; *Narapa Annaji*, *P. J.* 1884, p. 72; it does not apply to an application to sue *in formá pauperis*, where the respondent dies and the petitioner asks for the legal representatives of the respondent to be substituted in his place; *Janardhan v. Anant*, *I. L. R.* 7 *Bomb.* 373.

It has been held in Calcutta that the right to apply in a pending suit, *i. e.*, one in which no final order has been passed, accrues from day to day, and therefore this Article does not apply to an application to revive a suit by adding the representatives of a deceased defendant; *per Wilson, J.*, in *Kedarnath v. Harra*

*Chund*, I. L. R. 8 Calc. 420. The principle of this decision seems to be quite inconsistent with the cases cited under Art. 171, now Art. 175A; *q. v.*, but the decision itself can be supported on the principles laid down in *Benode v. Sharat*, I. L. R. 8 Calc. 837, where it was held that where a suit for property abates because of the devolution of that property through the death of the defendant, or other parties, it is not a case of abatement with the survival of the cause of action to which Sect. 368, Civ. P. C., is applicable, but the devolution of an interest pending the suit, provided for by Sect. 372, and the time limited for an application to amend the plaint by substituting the names of the persons on whom the property has devolved is that provided by Art. 178, *viz.*, three years. The decision in *Khushalbhai v. Kabhai*, I. L. R. 6 Bomb. 26 was based on the ground that, as, at the time the application was made, this Article had just come into force, and the application was actually barred under its provisions at the time of its becoming operative, it must be held not to be applicable thereto; but as the suit was for possession of land, the interest in which (if any) had devolved during the pendency of the suit, the decision could still be supported on the foregoing grounds. If the foregoing principles be correct the ruling in I. L. R. 8 Calc. 837, can still be supported.

The case of *Benode v. Sharat* was dissented from in *Jamnadas v. Sorabji*, P. J. 1891, p. 30, where it was held, following *Rajaram v. Jibai*, I. L. R. 9. Bomb. 151, that where an interest in a suit devolved on the death of a defendant on his legal representatives, Sect. 368, C. P. C., applied and not Sect. 372, and that the time provided by this Article was applicable, and not that under Art. 178.

**Art. 176.** *Under the Code of Civil Procedure, Sections 516 or 525, that an award be filed in Court; six months from the date of the award.*

### Notes.

This Article corresponds to Art. 165 of Act IX of 1871, which, however, only applied to awards made without the intervention

of a Court under Sect. 327 of Act VIII of 1859 for applications under Sect. 516, no limitation was previously provided.

The "date" of the award is not merely the particular date inserted in the award as indicating when it was signed, but the time when it is given to the parties, when it becomes an award, and is handed to them, so that they may be able to give effect to it; *Sreenath Chatterjee v. Kirglash Chunder*, 21 W. R. 248; approved of in *Dutto Singh v. Dosad Bahadur*, I. L. R. 9 Calc. 575.

The act of an arbitrator handing in his award to a Court is not an application under Sect. 516, and this Article, therefore, does not apply to such an act. *Quære*, whether the application under Sect. 516, referred to in this Article, is an application by one of the parties to a suit to compel an arbitrator to file his award; *Roberts v. Harrison*, I. L. R. 7 Calc. 333.

**Art. 177.** *For the admission of an appeal to Her Majesty in Council; six months from the date of the decree appealed against.*

### Notes.

The time necessary to obtain a copy of the judgment appealed against cannot be excluded from the computation of the period of limitation provided by this Article; *per Stuart, C. J., Spankie, J., dissentiente*, in *Jawahir v. Narain Das*, I. L. R. 1 All. 644; *Lakshmanan v. Peryasami*, I. L. R. 10 Mad. 373; *Anderson v. Periasami*, I. L. R. 15 Mad. 169; *In re Sita Ram*, I. L. R. 15 All. 14.

The limitation for the application referred to in this Article was originally provided for by Sect. 599, Civ. P. C., 1877, but that section was repealed by this Act. Sect. 599 was, however, restored to its former place in the Civ. P. C., 1882, and thereafter it was decided that this Article must, consequently, be taken to be repealed; *Fazul-un-nissa v. Mulo*, I. L. R. 6 All. 250. Sect. 599, Civ. P. C., 1882, has, however, been repealed by Act. VII of 1888, Sect. 57, so that this Article now stands in the same position as when it was first passed. See also the remarks of the Court on the course of Legislation with regard to appeals to the Privy Council in *In re Sita Ram*, *ubi supra*.

Delay caused by the opposite parts in drawing up the decree cannot be allowed, so ruled by the High Court, Bombay, in *Gunasham v. Moroba*, not yet reported.

**Art. 178.** *Application for which no period of limitation is provided elsewhere in this schedule, or by the Code of Civil Procedure, Section 230 ; three years from the date when the right to apply accrues.*

### Notes.

This Article is entirely new, and would seem to include so much of Art. 166 of Act IX of 1871, as relates to the execution of decisions of Revenue Courts, except so far as there are special or local laws providing for the execution of such decisions, and then Sect. 6 would except them from the provisions of this Article.

Act IX of 1871 provided periods of limitation for suits, appeals and *certain* applications which were enumerated in the third division of the second schedule to that Act. The present Act retains the same enumeration of subjects to which it is applicable, but after enumerating *certain* applications enacts a period of limitation in the above terms for applications not otherwise provided for. *Westropp*, C. J., and *Melvill*, J., have ruled that this Article applies only to applications under the Civil Procedure Code, because all the other applications in this division are applications under the Code, and it is natural thence to conclude that the applications referred to in the Article are applications *ejusdem generis*, *i. e.*, under the Code ; *Manikbai v. Manikji*, *I. L. R. 7 Bomb.* 213 ; followed in *Empress v. Ajudhia Singh*, *I. L. R. 10 All.* 350. No doubt, there may be a certain amount of inconvenience if this ruling be not adopted, but, on the other hand, the Article does not apply to *other* applications, but to applications, *i. e.*, *any* applications, not otherwise provided for, and is in as general terms as the Articles which provide a limitation for suits not otherwise provided for. This is a point worthy of the attention of the Courts as well as the Legislature. *Farran*, J., after having had this paragraph cited to him, decided that this Article did not apply to

an application by an official liquidator to have a call made on the contributories of a company in liquidation; *In re Kattyawar Trading Co.*, 30th April 1887.

It has been held that the Legislature cannot be supposed to have intended to include in a Limitation Act every application to a Court in reference to the way in which it transacts its own business in the arrangements made for the hearing of cases; such as applications to transfer a case from one board to another, to put a certain case at the bottom of the list, to change attorneys, and so forth; *Govind Chunder v. Rungummoney*, *I. L. R. 6 Calc.* at p. 63; therefore where a case, after decree, is struck off the Board for want of prosecution, it is not dismissed, and an application to the Court to have it restored is not one to which the provisions of the Limitation Act apply, *ib.* 60; nor do the provisions of a Limitation Act apply to applications for the exercise of functions of a ministerial character; *Kylasa v. Ramasami*, *I. L. R. 4 Mad.* 172; followed in *Vithul Janardhan v. Vithojirav*, *I. L. R. 6 Bomb.* 586; *Ishvardas v. Dossibai*, *I. L. R. 7 Bomb.* at p. 322; *Darbo v. Kesho Rai*, *I. L. R. 9 All.* 364.

This Article does not apply to applications for probate; *In re Ishan Chunder*, *I. L. R. 6 Calc.* 707; *Manikbai v. Manikji*, *I. L. R. 7 Bomb.* 213; *Gnanamuthee v. Vana Koilpillai*, *I. L. R. 17 Mad.* 379; nor to applications under Act XXVII of 1860 for certificate to collect debts due to the estate of a deceased person; *Janaki v. Kasavalu*, *I. L. R. 8 Mad.* 207, nor to applications to revoke a probate, *Kashi v. Gopi*, *I. L. R. 19 Calc.* 48.

It does not apply to applications for the issue of a certificate of sale after a sale in execution of a decree, *Vithal Janardhan v. Vithojirav*, *I. L. R. 6 Bomb.* 586, following *Kylasa v. Ramasami*, *I. L. R. 4 Mad.* 172; and dissenting from *In re Khaja Patthanji*, *I. L. R. 5 Bomb.* 202; and *Tukaram v. Satvaji*, *ib.* 206; see, also, *Devidas v. Pirjada*, *I. L. R. 8 Bomb.* 377. It does not apply to an application to pass judgment according to an award already filed in Court, *Ishvardas v. Dosibai*, *I. L. R. 7 Bomb.* 316; nor does it apply to an application for leave to prosecute under Sect. 195, Cr. P. C., *Emp. v. Ajudhia Singh*, *I. L. R. 10 All.* 350.

It does not apply to an application for an order absolute for the sale of mortgaged property under Sect. 89 of the Transfer of Property Act, 1882; *Rambir v. Drigpal*, I. L. R. 16 All. 23.

The power of a Court to order a person to be made a party defendant under Sect. 32 of the Civ. P. C. is not bound by any period of limitation whether the order be made of its own motion or on an application by some person desiring to become a party; *Oriental Bank v. Charriol*, I. L. R. 12 Calc. 642; but if the suit be not properly constituted without the added party, and he is not added until after the period of limitation has expired, the suit must be dismissed; *Imam-ud-din v. Liladhur*, I. L. R. 14 All. 524.

Granting leave to sue under Cl. 12 of the Letters Patent is neither a decree nor order, and the period of limitation for an application to set aside such leave is provided by this Article; *Kessowji v. Luckmidas*, I. L. R. 13 Bomb. 404.

Applications under Sect. 206, C. P. C., to make a decree conformable to the judgment are not subject to any period of limitation, and, consequently, need not be made within the three years provided by this Article; *Jivraji v. Pragji*, I. L. R. 10 Mad. 51; *Shivappa v. Shivpanch*, I. L. R. 11 Bomb. 284; *Darbo v. Kesho Rai*, I. L. R. 9 All. 364. In the last two cases, *Gaya v. Sikri*, I. L. R. 4 All. 23, to the contrary effect was dissented from. The Madras and Bombay cases were followed in *Kalu v. Latu*, I. L. R. 21 Calc. 259.

In a suit in ejectment for the recovery of land, where the defendant dies, an application by the plaintiff to substitute the names of the defendant's heirs comes under Sect. 372, Civ. P. C., and the limitation provided by this Article applies; *Benode Mohini v. Sharat Chunder*, I. L. R. 8 Calc. 837; see, also, *Kedarnath v. Harra*, ib. 420, where practically, the same order was made, as the death of the defendant was within three years before the date of the application, though the matter was complicated by the fact that the case had been struck off the file, though not dismissed.

An application for the completion of a decree must be made within three years, e.g., after a decree for possession with



mesne profits, application for an enquiry into the amount of mesne profits must be made within three years of the passing of the decree; *Anando Kishore v. Anando Kishore*, I. L. R. 14 Calc. p. 54 (distinguishing *Baroda v. Ferguson*, 11 C. L. R. 17); but overruled by *Puran v. Roy Radha*, I. L. R. 19 Calc. 132 (F. B.); which decided that neither this article nor Art. 179, applied to applications to ascertain the amount of mesne profits awarded by a decree, in accordance with the provisions of Sect. 211 or 212, C. P. C.

Applications for possession of immoveable property sold in execution of a decree come under this Article, and limitation runs from the date of the issue of the sale-certificate; *Basapa v. Marya*, I. L. R. 3 Bomb. 433 (F. B.); *Chotalal v. Lallu*, P. J. 1884, p. 6; *Hanmantrav v. Subaji*, I. L. R. 8 Bomb. 257; *Motichand v. Naikji*, P. J. 1886, p. 46.

Where a decree awards a perpetual injunction, application for execution of the decree must be made within three years from the time when there is a breach of the injunction; *Sadagopa v. Krishnama*, I. L. R. 12 Mad., p. 364.

Where a decree provided that, if the debt decreed was not paid within four months, it might be recovered by the sale of certain mortgaged property: it was held that this Article was applicable; *Thakur Das v. Shadi Lal*, I. L. R. 8 All. 56; and that limitation ran from the expiry of the four months; but, surely, cl. 6 of Art. 179 applies directly to such a case. Following this case, the High Court at Allahabad has ruled that where a decree was made for possession of immoveable property which was not to be executed unless the judgment-debtor made default in payment of any one year's instalment of a certain annuity agreed to be paid to him to the plaintiff, in which case the plaintiff was to be entitled to possession, the plaintiff was entitled to execute the decree within three years of any one default and was not bound to execute within three years of the first default, and that the case fell under this Article; *Muhammad Islam v. Muhammad Ahsan*, I. L. R. 16 All. 237.

An application to set aside a sale under a decree on the ground that the property was purchased by the decree-holder without the

sanction of the Court, falls under this Article; *Chintamanrao v. Vithabai*, I. L. R. 11 Bomb. 588; but as to this see Art. 166.

*Application for continuance or revival of execution proceedings* which have been stayed are not provided for by Art. 179, and, consequently, this class of application, will fall under this Article, time running from the date when something occurs which removes the stay. Where an application, for execution of a decree, has been made and granted, but execution is subsequently stayed by an injunction which is afterwards dissolved, the decree-holder may, under this Article, apply for a revival of the execution proceedings, within three years from the date of the dissolution of the injunction; *Kalyanbhai v. Ganashamlal*, I. L. R. 5 Bomb. 29; followed in *Raghobans v. Sheosaran*, I. L. R. 5 All. 243; *Buti v. Nihal Chand*, ib. 459; *Basant Lal v. Batul*, I. L. R. 6 All. 23; *Chandra v. Gopi Mohun*, I. L. R. 14 Calc. 385; and this principle will be applied wherever any obstacle has arisen which renders execution impossible, or which constitutes a practical objection to a complete execution of a decree; *Chintaman v. Balshastri*, I. L. R. 16 Bomb. 294. If in the meantime, the decree-holder has died the right of his representatives to be made parties to the execution does not accrue until the injunction has been dissolved, *Kalyanbhai v. Ganashamlal*, *ubi sup.*; but if no application has been made for execution then the right to execute having accrued on the passing of the decree, limitation is not stopped by an injunction; *Rayarathnam v. Shevalayamma*, I. L. R. 11 Mad. 103; the High Court holding that, as in this case an application for execution had to be made, and not merely one for continuance of execution already ordered, Art. 179 was the one which governed the case, and that made no provision for extension of time for the application to execute. This seems a hard case, as the injunction might be obtained immediately after the decree had been passed, and before there had been any time to apply for execution, and without any fault be barred of execution. Possibly, the difficulty might be got over by a decree or order discharging the injunction being drawn up in such a form as to be a decree or order capable in itself of being executed for the amount, &c., for which the barred decree was good; see

*Hulasi v. Maiku*, I. L. R. 5 All. 236; and the remarks of the Privy Council as to the form of appellate decrees in *Kistakonker v. Burrodacaunt*, 10 Ben. L. R. p. 114.

A successful plaintiff in a pre-emption suit was ordered to pay a certain sum into Court, which sum was increased by the first Appellate Court and the plaintiff paid the increased sum into Court on the 6th July 1880. On a second appeal the amount was again increased, but the plaintiff let the time appointed for paying the difference into Court pass by, and on the 25th May 1883 applied for a refund of what he had already paid as he was not willing to pay the increased price, and such refund was ordered but the defendant carried the case into appeal which was dismissed in January 1885, execution of the order for refund having in the meantime been stayed; in February 1885, the plaintiff again applied for a refund, asking for attachment and sale of the defendant's property; this application was dismissed as barred by limitation. On appeal to the High Court: it was held that the present application was an application for the revival of that of May 1883, and was, therefore, within time; *Nana Ram v. Sita Ram*, I. L. R. 8 All. 545.

An application for execution was made in proper time, and a sale of property was ordered, but a claimant came in and got the sale stopped. Thereupon the execution-creditor filed a suit, and the order allowing the objection of the claimant was set aside. On the execution-creditor applying, more than three years after the former application, but within three years from the setting aside of the said order, for re-attachment of the property: it was held that this was not a fresh application for execution, but an application to have the old proceedings revived and would fall under this Article; *Baboo Pyaroo v. Syud Nazir*, 23 W. R. 183; *Paras Ram v. Gardner*, I. L. R. 1 All. 355; *Phiraya v. Adu Ram*, Panj. Rec. No. 179 of 1882; *Chintaman v. Balshastri*, I. L. R. 16 Bomb. 294; but if the application had been to attach other property, it would have been a new application, and would have been barred; *Ramssoonder v. Gopessur*, I. L. R. 3 Calc. 716. In the case of *Issurree v. Abdool*, I. L. R. 4 Calc. 415: it was held that an application to have the pending execution proceed

ings continued, and an attachment issued on a prior application for execution, could be granted more than three years after the date of its presentation, under the following circumstances:— A decree was executed, property of the judgment-debtor was sold, and the proceeds paid over to the judgment-creditor. Subsequently, the judgment-debtor got all the proceedings in execution set aside and the proceeds of the sale paid to him. Thereupon, the judgment-creditor, more than three years after the date of his first application, applied to have the decree executed; and it was held that the application was in effect one to take up the former application for execution, and act upon it. The difference between the rulings in these two cases seems to arise from the fact that the form of the application in each was different, and the facts different, but there would seem to be no reason why *any* application for execution should not be taken up afresh in the event of its having been stayed or interfered with, provided it was in such a form as would allow of such a course being adopted. An application to execute a decree by the sale of certain property could not be taken up again if that property eventually turned out not to be available; but a general application to execute, accompanied or followed by an application to attach certain property, might possibly be revived, although that particular property was not available. It has, however, been ruled that if the property sold was not the property of the judgment-debtor, and the judgment-creditor has had to refund the money received to third parties, the previous application could not be revived; *Khair-un-nissa v. Gouri Shankar*, I. L. R. 3 All. 484; and that an application for execution could not be considered as a revival of a former one, where the former one was an application for execution against the property, and the latter against the person of the judgment-debtor; *Krishnaji v. Anandray*, I. L. R. 7 Bomb. 293; *Virasami v. Athi*, I. L. R. 7 Mad. 595; nor yet where the application was that certain property already attached should be released, and other property attached in its stead; *Sreenath v. Yusoof Khan*, 9 C. L. R. 334. Where a judgment-creditor attached property, and a claimant succeeded in getting the attachment removed in respect of two-

thirds of the property, and this removal having been upheld in a suit brought by the attaching creditor, the creditor, more than three years after his first application, applied for execution against the one-third : it was held that this application was not a renewal of his former one, and was, therefore, barred; *Rughoonandun v. Bhugoo Lall*, *I. L. R.* 17 *Calc.* 271. See, also, *Ganpat Rai v. Mehra*, *Panj. Rec.* No. 30 of 1882.

In *Narayana v. Pappi*, *I. R.* 10 *Mad.* 22, the case of *Paras Ram v. Gardner*, *ubi supra*, was not followed on the ground that Art. 179 provides for *all* cases of execution, and that in this case the only period named in Art. 179 from which limitation could run was the date of the decree to the execution of which objection was taken; but, assuming that Art. 179 is applicable, then it may be argued that what was really sought to be executed was the decree by which it was declared that the judgment-creditor was entitled to sell the property attached in the other suit, and time for the execution of this would run from its date; see *Hulasi v. Maiku*, *I. L. R.* 5 *All.* 236. The Chief Court in the Panjab seems not to be of the same opinion as the High Court in Madras; see *Mehr Jung v. Faizulla*, *Panj. Rec.* No. 154 of 1890; which must indicate a change of opinion from the time when the decision was given in *Eshar v. Ghasita*, *Panj. Rec.* No. 168 of 1883, *quod vide*.

Where execution proceedings are struck off the file, but with an order that an attachment already placed on certain property should continue, a subsequent application that such attached property should be sold is not a new application for execution, but one for the continuance of proceedings under the old application; *Panaul Huq v. Kishen*, 9 *C. L. R.* 297; nor is an application after attachment to have the attached property sold, which must be made within three years after attachment; *Joobraj v. Buhooria*, 7 *C. L. R.* 424.

Where a judgment-creditor attached certain property, and the life interests of certain persons in a part of the property were exempted from sale, it was held that such exemption did not operate to suspend execution, as such portion could still have

been sold subject to the life interests; *Sadarni v. Kanwar, Panj. Rec.* No. 129 of 1888.

Where a receiver has been appointed in execution to collect the rents of a property in satisfaction of a decree, the attachments still continuing, the execution proceedings continue so long as the appointment of the receiver continues, although the execution case is struck off the file; *Radha v. Aftab, I. L. R. 7 Calc.* 61.

Where execution is stayed by an agreement, certified to the Court, that the judgment-debtor and the judgment-creditor have agreed that the amount of the decree should be paid by instalments, and that, in the event of any instalment not being paid, execution should issue for the unpaid balance of the decree, limitation will run, under this Article, from the date of default in payment; *Sham Karan v. Pairi, I. L. R. 5 All.* 596; in this case it might be considered that the Court passed a new decree capable of being executed on its own merits; see, also, *Kurta Ram v. Karthli, Panj. Rec.* No. 77 of 1884, and *Rapu Ramrav v. Bhawan Sing, P. J.* 1885, p. 183; but where the execution proceedings are struck off the file without any understanding that the execution proceedings are to be considered as still pending, a subsequent application for execution on default on the part of the judgment-debtor cannot be considered as a continuance of the previous application; *Hurronath v. Chunni Lall, I. L. R. 4 Calc.* 877; but striking off an execution order from the file is an act which may admit of different interpretations according to the circumstances of the case, and is not conclusive proof that the execution proceedings were intended to be abandoned; *ib.*; *Venkatrav v. Bijesing, I. L. R. 10 Bomb.* 108; *Chintaman v. Balshastri, I. L. R. 16 Bomb.* 294.

An application by Government to recover Court fees under Sect. 411, Civ. P. C., comes under this Article; *Appaya v. Collector of Vizagapatam, I. L. R. 4 Mad.* 155.

Applications for refund of money levied in execution fall under this Article; *Kurupam v. Sadasiva, I. L. R. 10 Mad.* 66. Where a judgment-debtor applied for a refund of money alleged to have

been received in excess by the judgment-creditor, and, thereupon, the Court ordered an account to be taken, when it was found that a balance was due to the judgment-debtor for which he brought a suit which was dismissed as not being the proper mode of recovering the excess; and the judgment-debtor then applied to the Court which had executed the decree for an order upon the judgment-creditor to refund the excess; it was held that this Article applied, and that time ran from the date when the Court took the account; *Mula Raj v. Debi*, I. L. R. 7 All. 371. The latter part of this decision seems to be contrary to the ordinary rule that, in claims for excess payment, time runs from the date when the excess payment is made.

Applications for the refund of purchase-money, where the sale by the Court has been set aside fall under this Article; *Girdhari v. Sital Prasad*, I. L. R. 11 All. 372.

Where no schedule of an insolvent has been prepared under the provisions of the Civ. P. C., and a creditor applies to prove his debt in order that it may be inserted in a schedule, limitation under this Article runs from the date of declaration of insolvency; *Parshadi v. Chunni Lal*, I. L. R. 6 All. 142.

The petitioner, a registered creditor of the insolvent defendants applied in March 1880, to enforce payment of his registered debt. It appeared that the insolvent had agreed to pay yearly instalments, but that since 1874 nothing had been paid by him. It was held that the applicant had a right to apply in 1875 on failure of payment of the instalment due in that year, but that as he had made no application till 1880, he was too late under this Article; *Muhammad v. Lachu*, Panj. Rec. No. 52 of 1882.

### EXECUTION OF DECREES.

Before considering the provisions of the next two Articles respecting the period of limitation provided for the execution of decrees, it will be well to consider the provisions of Sect. 230, Civ. P. C., which, also, provides a period of limitation after which decrees cannot be executed.

Sect. 230, so far as it relates to the present question is as follows:—"Where an application for the execution of a decree for

the payment of money or delivery of other property has been made under this section and granted, no subsequent application to execute the same decree shall be granted after the expiration of twelve years from any of the following dates (namely):—

- (a) The date of the decree sought to be enforced, or of the decree (if any) on appeal affirming the same, or
- (b) Where the decree or any subsequent order directs payment of money, or the delivery of any property to be made at a certain date—the date of the default in making the payment or delivering the property in respect of which the applicant seeks to enforce the decree. \* \* \* \*

*[Notwithstanding anything herein contained, proceedings may be taken to enforce any decree within three years after the passing of this Code unless when the period prescribed for taking such proceedings by the law in force immediately before the passing of this Code shall have expired before the completion of the said three years.]*

In both Act X of 1877 and Act XIV of 1882, Sect. 223 provides that a decree may be executed, either by the Court which passed it, or by the Court to which it is sent for execution. Sect. 230 in both Acts provides that the holder of a decree desiring to enforce it, *shall* apply to the Court which passed it, or to the Court to which it is sent for execution, or to the proper officer of such Court. *All applications* to execute decrees had, therefore, to be made under Sect. 230 of Act X of 1877 while it was in force, and at the present time must be made under Sect. 230 of Act XIV of 1882. Consequently, the heading of Form No. 21 of the Bombay High Court Rules, "Application for execution under Sect. 235 of the Code of Civil Procedure," is misleading, for it would indicate that the *application* is made *under* that section which is not the case, as that section does not provide for the making of the application, but only that the application made under Sect. 230 shall be in a certain form. It is important to bear in mind that the only section that directs an application for execution, and points out the Court to which it is to be made, is Sect. 230. The whole section, so far as the provisions of the Code are concerned, applies to all ordinary Civil Courts, to the Mofussil Small



Cause Courts, and to the High Courts, for these last are not excluded from its operation by Sect. 638. The first two clauses only, not printed here, are applicable to the Presidency Small Causes Courts. The question, whether, taking all these things into consideration, this section applies to the High Courts, so as to control Art. 180 of the Limitation Act, is a somewhat difficult one; *per White, J.*, in *Ashootosh v. Durga*, *I. L. R. 6 Calc.* at p. 512; and the difficulty has been created by the Legislature, through not distinctly exempting the High Courts from the operation of the limitation clauses of this section; *Ganapathi v. Balasundara*, *I. L. R. 7 Mad.* at p. 545.

It has, however, been subsequently ruled by *Westropp, C. J.* and *Melville, J.*, that Art. 180 of Act XV of 1877 is independent of Sect. 230 of Act X of 1877 and not controlled by it; *Mayabhai v. Tribhowandas*, *I. L. R. 6 Bomb.* 259. The judgment in this case is short, but from the cases referred to therein (*Unnoda v. Kristo*, 15 *Ben. L. R.* 60, *n.*; *Thorpe v. Adams*, *L. R. 5 C. P.* 125; *Reg. v. Champneys*, *ib.* 384) the reason for the judgment seems to be, that as a subsequent *general* act cannot be construed so as to repeal a previous *particular* act (see *In re West Devon Consols Mine*, 28 *Ch. D.* 51), much less can a previous general act be construed so as to control a subsequent particular act. The principle laid down in the cases cited would be applicable to the present state of things, where the Limitation Act applying a *particular* limitation to decrees of the High Courts is prior in date to the present Civil Procedure Code which provides a *general* limitation for decrees of all Courts. It is further to be noted that, while Arts. 178 and 179 contain an express provision exempting from their operation applications provided for by Sect. 230, Civ. P. C., Art. 180 contains no such exception. The case in *I. L. R. 6 Bomb.* was followed in *Ganapathi v. Balasundara*, *I. L. R. 7 Mad.* 540, decided after the present Civil Procedure Code came into force. It may, therefore, be concluded that Sect. 230 does not apply to the execution of decrees of the High Courts passed in the exercise of their original civil jurisdiction.

The provisions of the third clause of Sect. 230 of Act X of 1877, *i. e.*, the first five lines of the section set out at p. 354

applied only to cases in which an application had been made under that section and granted, and not to a case in which the prior application was made under Act VIII of 1859; *Ashootosh v. Durga*, I. L. R. 6 Calc. at p. 512; following *Byraddi v. Dasappa*, I. L. R. 1 Mad. 403; *Ramkishen v. Sedhu*, I. L. R. 2 All. 275; *Anandray v. Thakarchand*, I. L. R. 5 Bomb. 245; *Panaul v. Kishen*, 9 C. L. R. 297. So the corresponding clause of the present section applies only to cases in which an application has been made and granted under this section, and not to a case where the prior application was made under Act X of 1877; *Ganapathi v. Balasundari*, I. L. R. 7 Mad. at p. 543. But, if prior applications have been made under Act X of 1877, and an application is made and granted under this section, then the subsequent applications will fall within its terms and be subject to its provisions; but in order to be granted, the application must be conformable to the requirements of Art. 179, or it will be barred, although the fact that the prior application was not under this section will prevent the twelve years' rule applying; *Annaji v. Ramji*, I. L. R. 10 Bomb. 348; *Martand v. Amritray*, P. J., 1891, p. 269.

The term "application to execute a decree" means any application for that purpose which is made and granted within the period of twelve years; *Tilashar v. Parbati*, I. L. R. 15 All. 198.

The granting of an application for execution includes the issue of process for execution; *Nilmoney v. Biressur*, I. L. R. 6 Calc. 744. An application for the transfer of a decree to another Court for execution is not an application for execution; *ib.*

An application by a decree holder on which the judgment-debtor was arrested and brought up to Court, although he was subsequently released, is an application which has been granted; *Misri v. Tulsi*, Panj. Rec. No 54 of 1887.

The object of this clause is to curtail the time allowed for the execution of decrees; *Kunbi v. Seshagiri*, I. L. R. 5 Mad. 141, and to set a time *after which* decrees which fall within its provisions shall not be executed, and that term is twelve years from the dates specified therein, and that is its sole object. It does not provide the time within which applications for execution must

be made in order to be granted, that is provided by Art. 179; nor does it in any way override the provisions, of that article; *Mul Chand v. Kour Singh, Panj, Rec.* No. 27 of 1888; *Gholam v. Ganga Ram, ib.* No. 9 of 1891. Consequently, if no application for the execution of a decree be made till after the expiry of three years from its date, unless anything has happened which under the Limitation Act would extend that time, execution is barred; but if the requirements of the Limitation Act have been complied with by applications for execution under Sect. 230 so as to keep the decree alive for twelve years, then at the end of twelve years from the dates specified in that section further execution is barred; *Mayaram v. Lalbhai, P. J.* 1879, p. 573; *Laldas v. Bhagvanji, ib.* p. 574. If no application has been made within the twelve-year periods, Art. 179 will operate as a bar to any application after the twelve years, unless the decree has been kept alive by acknowledgments which satisfy Sect. 19 of the Limitation Act, or, possibly, by payments under Sect. 20, *q. v.*, but if the decree has been kept alive by either of these methods, an application under Sect. 230 to execute the decree after the twelve years would at once bring the case under its provisions and no further application could be made. The effect of force or fraud used to prevent the execution of the decree is not being now considered, but only lapse of time. Where an application has been made within the twelve years, but not *granted*, if the decree is still alive, an application may be made for its execution after the expiration of the twelve years; see *Dewan Ali v. Soroshibala, I. L. R.* 8 *Calc.* 297; *Chengaya v. Appasami, I. L. R.* 6 *Mad.* 172; and where an application is made within the twelve years, it may be granted after the expiry of that period; *Virarama v. Annasami, I. L. R.* 6 *Mad.* 359. An application for execution must be reckoned as granted when an order for attachment is made thereon, although no property can be found on which the attachment can operate; *Afrunmissa v. Sharafutullah, 9 C. L. R.* 321.

*Disability.*—*Quære*, whether any disability occurring after the date of the decree will extend the period mentioned in this section; *Lolit Mohun v. Janory Nath, I. L. R.* 20 *Calc.* 714.

The next point to be considered is the effect of the proviso at the end of the section, which is the same in the Act of 1877 as in that of 1882. This proviso has been repealed by Act VII of 1888, Sect. 25, and is now printed in italics within brackets. In consequence of this repeal no new cases can arise under it, but the old cases are retained in the present edition for reference in case any points under it might still need discussion. *Firstly*, under Act X of 1877, in the case of decrees under Act VIII of 1859 which had been kept alive up to the date of the passing of Act X of 1877, but in respect of which the twelve-year period of limitation had expired, *an* application could be made to execute such a decree within three years from the passing of that Act, but at the end of the three years such decrees became incapable of being further executed; in the case of decrees in respect of which none of the twelve-year period of limitation had expired when Act X of 1877 came into force, any number of applications could be made for execution under that Act until the expiry of the period applicable to each particular decree. See *Sreenath v. Yusoof*, *I. L. R. 7 Calc.* 556; *S. C. 9 C. L. R.* 384; *Bhawani v. Daulat*, *I. L. R. 6 All.* 388.

*Secondly*. The proviso in Sect. 230 of Act XIV of 1882 is not intended to revive decrees which have become dead before it became law; *Bhawani v. Daulat*, *ubi sup.*, but it was held by the majority of a Full Bench in Allahabad that it did not matter in the case of an application under this section made within the three years, if the decree has passed beyond one of the twelve-year periods, provided that it had been kept alive according to the provisions of the law of limitation; *Musharaf v. Ghali Ali*, *I. L. R. 6 All.* 189; but this has been dissented from in *Goluck Chunder. v. Harapriah*, *I. L. R. 12 Calc.* 559, in which it was held that in determining under this proviso whether a decree can be executed, regard must be had both to the law of limitation and to the provisions of Sect. 230 of Act X of 1877; so that although the decree has been kept alive according to the law of limitation, yet if, at the time of the first application within three years, under Sect. 230 of Act. XIV of 1882, any of the twelve-year periods have been passed, the decree cannot be executed;

see also *Misri v. Tulsi*, *Panj Rec.* No 54 of 1887. The judgment of the majority of the Full Bench of Allahabad seems on the whole to be the most conformable to the words of the section. In Act X of 1877, the words "period prescribed for taking proceedings," must have referred to the period prescribed by the Limitation Act, for Act VIII of 1859 had no such provision as that contained in Sect. 230 of the latter Act in respect to the twelve-year period. Therefore, when the Legislature repeat the same words in Act XIV of 1882, *prima facie*, they must refer to the same thing. Moreover, there is "no period prescribed for taking proceedings" in Clause 3 of Sect. 230 of Act X of 1877; on the contrary, the effect of that clause was simply to limit the right of a decree-holder to apply for execution after a certain time, and left his right to take proceedings within that time to the operation of the ordinary law of limitation. The minority of the Full Bench and the Judges in the case in Calcutta do not seem to have appreciated, and certainly did not answer the argument of the majority in Allahabad. No doubt, the effect of the Allahabad decision is to give an extension of three years for the execution of decrees which would have become barred if Act X of 1877 had continued in force, but whether the framers of Act XIV of 1882 intended that result or not, the intention of the Legislature can only be gathered from what it has enacted; and, without the aid of any decided cases, I should have read the clause in question in Act XIV of 1882 in the same way as the majority of the Full Bench at Allahabad have done. The High Court at Bombay has, however, decided in accordance with the views of the minority of the Full Bench at Allahabad, and the High Court at Calcutta; *Tajubibi v. Sobhgaya*, *P. J.* 1885, p. 173; but the learned Judges from the judgment delivered in this case do not seem to have discussed the meaning of the words of this proviso. The judgment in Calcutta has since been followed in *Motichund v. Krishnarav*, *I. L. R.* 11 *Bomb.* 524; *Kollu v. Manjaya*, *I. L. R.* 9 *Mad.* 454; and *Komu v. Krishna*, *I. L. R.* 11 *Mad.* 134. The introduction of this proviso into the present Act has caused this confusion, and its effect was probably not considered by the Legislature. No doubt, it was intended that

this Act should practically be a continuation of Act X of 1877, with certain amendments, and to have effectuated this object, the proviso should have been left out, and the third clause should have run thus:—Where an application \* \* has been made under this section, or under Sect. 230 of Act X of 1877 and granted, no subsequent application under this section shall be granted, &c. The three years' grace provided for by Sect. 230 of Act X of 1877 had long since run out, all decrees were governed by the twelve years' rule, and all that was required was to keep the same rule in existence. This suggestion has practically been carried out by the repeal of the clause in question by Act VII of 1888, Sect. 25.

**Art. 179.** *For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, Section 230; three years; or, where a certified copy of the decree or order has been registered, six years; from*

1 *the date of the decree or order, or*

2 *(where there has been an appeal) the date of the final decree or order of the Appellate Court, or*

3 *(where there has been a review of judgment) the date of the decision passed on the review, or*

4 *(where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order, or*

5 *(where the notice next hereinafter mentioned has been issued) the date of issuing a notice under the Code of Civil Procedure, Section 248, or*

6 *(where the application is to enforce any payment which the decree or order directs to be made at a certain date) such date.*

*Explanation I.—Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in clause 4 of this number shall take effect in favour only of such of the said persons or their representatives as it may be made by. But when the decree or order*

*has been passed jointly in favour of more persons than one, such application, if made by any one or more of them, or by his or their representatives, shall take effect in favour of them all.*

*Where the decree or order has been passed severally against more persons than one, distinguishing portions of the subject-matter as payable or deliverable by each, the application shall take effect against only such of the said persons or their representatives as it may be made against. But where the decree or order has been passed jointly against more persons than one, the application, if made against any one or more of them, or against his or their representatives, shall take effect against them all.*

*Explanation II.—“Proper Court” means the Court whose duty it is (whether under Section 226 or 227 of the Code of Civil Procedure or otherwise) to execute the decree or order.*

### Notes.

This Article corresponds to Arts. 167 and 168 of Act IX of 1871. Art. 168 applied to the execution of registered decrees, and in the description of the dates from which limitation began to run only mentioned the dates specified in clauses 1 to 3, omitting entirely clauses 4 to 6, which by the present Article are extended to registered decrees. The two explanations are new.

But a few alterations of some importance have been made. In cl. 4 the words “in accordance with law” and “proper” have been introduced; and the words “for execution or to take some step in aid of execution” have been substituted for “to enforce or keep in force.” In cl. 6, the words “any payment” have been substituted for “payment of “any instalment,” and thus apply to any decree by which a payment is ordered to be made at a future date, and not merely to those whereby a gross sum is ordered to be paid by instalments.

This Article would also seem to include so much of Art. 166 of Act IX of 1871 as relates to decisions of Civil Courts, as nothing corresponding to that Article appears in the present Act, and no decision of a Civil Court which would not come under the terms “decree” or “order” could be executed. The execution of

the decision of a Revenue Court, unless specially provided for in any other Act, would seem necessarily to fall under Art. 178.

The law of limitation applicable to the execution of a decree depends upon the Court by which it was passed, and not upon the Court executing it; *Tincowrie v. Debendro Nath*, *I. L. R. 17 Calc. 491*.

This Article and Art. 180 are applicable to all applications for execution made to a Civil Court after this Act came into operation, without regard to the Act in force at the time of the suit, the decree in which is sought to be executed, being instituted; *Gurupadapa v. Virbhadrappa*, *I. L. R. 7 Bomb. 459*; disagreeing with a decision of *Mitter* and *Norris*, JJ., in *Behury v. Goberdhun*, *I. L. R. 9 Calc. 446*, in which it was held that in the case of an application for execution made after this Act came into force, in a suit filed while Act IX of 1871 was in force, the period of limitation applicable was that provided by the last named Act. The correctness of the decision in this case was, however, doubted by *Mitter*, J., in *Radha Prosad v. Sundur Lall*, *I. L. R. 9 Calc. 644*, and disapproved of by both the Judges, who were responsible for it in *Jugmohun v. Luchmessur*, *I. L. R. 10 Calc. 748*; and was, also, disapproved of by *Prinsep* and *Macpherson*, JJ., in *Becharam v. Abdul Wahed*, *I. L. R. 11 Calc. 55*.

The wording of this Article and Art. 180 shews that only decrees of the High Courts pronounced in the exercise of their Ordinary Original Civil Jurisdiction, and orders of the Privy Council are entitled to the twelve years' limitation; and that any decree of the High Courts not made in the exercise of such jurisdiction will be governed by the limitation provided in this Article; *Hurro Pershad v. Bhupendro Narain*, *I. L. R. 6 Calc. 201*. This renders it unnecessary to cite any of the old authorities as to what is or is not a decree of the High Court.

The six years' limitation only applies when a certified copy of a decree has been registered, not to a case where only a memorandum of a decree has been sent for registration under Act XX of 1866; *Bhagvant v. Jankibai*, *P. J. 1883*, p. 168.



Government must make an application for execution within the same time as any private party; *Beerbhoon v. Sreehurry*, 22 *W. R.* 512.

*Clause 1. The date of the decree or order.*—Where a decree for possession has been executed and the plaintiff applies for an enquiry into the amount of mesne profits awarded by the decree, limitation in respect of execution for the amount of mesne profits, when determined, will run from the date of the final order determining such amount; *Dildar Hossein v. Mujeedunissa*, *I. L. R.* 4 *Calc.* 629; followed in *Krishnan v. Nilakandan*, *I. L. R.* 8 *Mad.* 137; *Baroda v. Ferguson*, 11 *C. L. R.* 17; *Anundo Kishore v. Anundo Kishore*, *I. L. R.* 14 *Calc.*, pp. 53, 54; but limitation for the application to assess mesne profits would fall neither under Art. 178 nor under this Article, there being no period of limitation for such applications; *Puran Uhand v. Roy Radha*, *I. L. R.* 19 *Calc.* 132 (*F. B.*); overruling *Baroda v. Ferguson*, and *Anundo Kishore v. Anundo Kishore*, on this point.

Where the execution of a decree has been allowed to become barred by limitation, and the plaintiff then obtains an amendment of the decree, he cannot be allowed to count the date of the amendment as a fresh starting-point for limitation, and obtain execution of the decree as so amended; *Tarsi Ram v. Man Singh*, *I. L. R.* 8 *All.* 492.

*Clause 2. The date of the final decree or order of the Appellate Court.*—The term “appeal” includes an appeal from a decree based upon a review of judgment; therefore, where there has been a decree on review of judgment which was set aside on appeal and the original decree upheld, limitation in respect of the execution of the original decree will run from the date of the appellate decree; *Narsingh v. Madho Das*, *I. L. R.* 4 *All.* 274. Though the appeal mentioned in this clause is, doubtless, an appeal from an original decree, yet if an order in execution has been appealed against, and the Appeal Court has made an order thereon which is capable of execution, an application to carry out that order may be entertained, although presented more than three years from the date of the application for execution which was so appealed; *Hulasi v. Maiku*, *I. L. R.* 5 *All.* 236.

The words "where there has been an appeal" mean where a memorandum of appeal has been presented to the proper Court (not presented *and admitted*); *Rup Singh v. Mukhraj*, I. L. R. 7 All. 887; *Akshoy v. Chunder Mohun*, I. L. R. 6 Calc. 250; dissenting from *Dianat v. Wajid Ali*, I. L. R. 6 All. 438.

It is sufficient that an appeal has been presented *and heard*, to bring the case within this clause, although the Appellate Court may have decided that no appeal would lie; *Wazir Mahton v. Lalit Singh*, I. L. R. 9 Calc. 100; but where an appeal is withdrawn by the appellant, no decree need be drawn up, and the date which governs limitation is that of the decree appealed against, which is the only decree which can be executed; *Hingan v. Ganga*, I. L. R. 1 All. 293; *Patloji v. Ganu*, I. L. R. 15 Bomb. 370; *Manavikraman v. Unniappan*, I. L. R. 15 Mad. 170; *Chudasama v. Mahant Ishwargar*, I. L. R. 16 Bomb. 243. Wherever the respondent waits the result of the appeal before taking steps, which in prudence he ought to take for his own security, he does so at his own risk; *Surbai v. Raghunathji*, 10 Bomb. H. C. Rep. 397. If in the case of *Hingan v. Ganga*, execution had been stayed pending the appeal, Art. 178 would apply, and limitation would run from the date when the stay of execution was removed by the withdrawal of the appeal.

Where the plaintiff obtained an *ex-parte* decree against the defendant, who, subsequently, but without success, applied to have the decree set aside, and then appealed against the refusal of his application: it was held that limitation would run from the dismissal of his appeal; *Lutful Huq v. Sumbhudin*, I. L. R. 8 Calc. 248; *secus*, *Sheo Prasad v. Anrudh*, I. L. R. 2 All. 273. The case of *Sheo Prasad v. Anrudh Singh*, I. L. R. 2 All. 273, was followed, and that of *Lutful Huq v. Sumbhudin*, I. L. R. 8 Calc. 248, dissented from, in *Jivaji v. Ramchandra*, I. L. R. 16 Bomb. 123. Where an appeal has been presented and heard, limitation will run from the date of the decree in appeal, although the original decree may, in the meantime, have been partially executed; *Venkatrayalu v. Narasimha*, I. L. R. 2 Mad. 174.

Where an original Court allowed part only of the plaintiff's claim, and rejected the remainder, and on appeal against such

rejection, the Appellate Court confirmed the decree of the Lower Court, it was held that the period of limitation would run from the date of the decree of the Appellate Court; *Sakhachand v. Velchand*, I. L. R. 18 Bomb. 208; following *Muhammad Sulleiman v. Muhammad Yar Khan*, I. L. R. 11 All. 267; and *Bhanushankar v. Raghunathram*, 2 Bomb. H. C. Rep. A. C. J. 101.

Where a judgment-creditor applied for the execution of a High Court decree which had been affirmed on appeal by the Privy Council: it was held that the Privy Council was an Appellate Court within the meaning of this clause, and that limitation ran from the date of the order of that tribunal; *Narsingh v. Narain*, I. L. R. 2 All. 763; *Gopal Sahu v. Joyram*, I. L. R. 7 Calc. 620; but the application in each of these cases ought to have been amended, and execution prayed of the decree passed by the Privy Council, because the only decree capable of execution is that of the Court finally hearing and deciding the case, whether the same reverses, modifies or confirms the decree of the Court from which the appeal is made; *Ram Charan v. Lakhi Kant*, 7 Ben. L. R., pp. 708, 709 (F. B.); following *Arunachella v. Veludayan*, 5 Mad. H. C. Rep. 217; and adopted by the Privy Council in *Kistolsinker v. Burrodacaunt*, 10 Ben. L. R., p. 114; *Shokrat v. Bridgman*, I. L. R. 4 All. 376 (F. B.); *Luchmun v. Kishun*, I. L. R. 8 Calc. 218; and when the application is so amended, the case will fall under Art. 180; see, also, *Nourang v. Latiff*, I. L. R. 13 All. 394; and *Munavikraman v. Unniappan*, I. L. R. 15 Mad. 170; *Nunchand v. Vithu*, P. J. 1894, p. 72. There are some remarks in the case in the Privy Council as to the proper form of appellate decrees, which, however, do not affect the law of limitation as laid down in *Wazir Mahton v. Lalit Singh*, I. L. R. 9 Calc. 100; see, also, *Jawahir v. Kistur*, I. L. R. 13 All. 343.

Where a purchaser under a sale in execution of a decree has been put in possession of fields, and the Appeal Court sets aside all the orders in execution of the decree made by the lower Court, the judgment-debtor has three years from the date of the decree in appeal to apply to be restored to the possession of his fields; *Uminshankar v. Chotalal*, I. L. R. 1 Bomb. 19.

A Munsiff decreed a suit for possession of land, but dismissed a claim for damages; on appeal the Judge affirmed the decree for possession, and remanded the case for an enquiry into damages which were given in favour of the plaintiff, and the finding of the Munsiff was affirmed in appeal on the 7th June 1873, and from this decision there was no further appeal. In the meantime an appeal had been preferred to the High Court against the former decision of the Judge, and on the 6th March 1874, the High Court modified the decree for possession, but allowed the order of remand to stand: it was held that limitation for the execution of the whole decree ran from the date of the decree of the High Court: *Imam Ali v. Dasaundhi*, I. L. R. 1 All. 508.

*Appeals on part of decree, or by one defendant.*—Where a decree has been passed in favour of the plaintiff for moveable and immoveable property, and the defendant appeals only against so much as relates to the moveables, the date from which limitation will run for execution in respect of the immoveable property is the date of the original decree, and not that of the date of the decree in appeal; *Sreenath v. Brojonath*, 13 W. R. 309; so, too, where one of two defendants has appealed on a ground not common to both, limitation will run in favour of the non-appealing defendant from the date of the original decree; *Sangram v. Brijharat*, I. L. R. 4 All. 36; *Hur Proshaud v. Enayet Hoosein*, 2 C. L. R. 471; or where the decree contains two separate orders, one of which is against one defendant, and the other against the other defendant, and one defendant only appeals, his appeal will not prevent limitation running in favour of non-appealing defendant; *Wise v. Rajnarain*, 10 Ben. L. R. 258; S. C. 19 W. B. 30; *Rughoonath v. Abdul Hye*, I. L. R. 14 Calc. 26; *Mashiat-un-Nissa v. Rani*, I. L. R. 13 All. 1 (F. B.); but, if the appeal by one defendant be on a ground which goes to the root of the whole decree, limitation will commence to run in favour of all the defendants only from the date of the decree in appeal; *Mullick v. Mahomed*, I. L. R. 6 Calc. 194; *Basant Lal v. Najuminissa*, I. L. R. 6 All. 14; *Gungamoyee v. Shib Sunker*, 3 C. L. R. 430; *Nundun Lal v. Rai Joykishen*, I. L. R. 16 Calc. 598; followed in *Kristo v. Radha*, I. L. R. 19 Calc.

750 ; see, also, *Nur-ul-Hasan v. Muhammad*, *I. L. R.* 8 *All.* 573 ; in which case, however, the principle was enunciated in wider terms than was necessary for the decision of the case ; see *Muthu v. Chellappa*, *I. L. R.* 12 *Mad.*, p. 480. Where in a joint and several decree which was *ex parte* against all the defendants except one, and that one successfully appealed as regards himself, limitation against the others will run from the date of the appellate decree ; *Gangamoyee v. Shib Sunker*, 3 *C. L. R.* 430.

Where a plaintiff obtains a decree against one defendant, his suit being dismissed as against another, and then unsuccessfully appeals against the dismissal, limitation will run in favour of the former from the date of the original decree, and not from that of the decree in appeal ; *Muthu v. Chellappa*, *I. L. R.* 12 *Mad.* 479.

*Clause 3. Where there has been a review.*—It is necessary that there should have been a review to bring the case under this clause, for it only applies to cases where there *has been* a review ; an order rejecting an application to review does not bring the case under this clause ; *Joykishen v. Ataoor*, *I. L. R.* 6 *Calc.* 22 ; *Kurupan v. Sadasiva*, *I. L. R.* 10 *Mad.* 66 ; consequently, a party in possession of a decree sought to be reviewed, either by himself, or by the opposite party, should bear this in mind, and apply to have the original decree executed, if the decision on the application for review is held over till the three years are nearly expired. If, however, there has been a stay of execution of the original decree pending the application for review, which is not removed till after the decision on that application, the case will fall under Art. 178, and limitation will run from the time the stay of execution is removed.

In 1864, a decree was passed in favour of the plaintiff against all the defendants in a suit for possession of land of which they claimed to be proprietors. All the defendants, except B, appealed to the High Court, which dismissed the suit and the plaintiff then appealed to the Privy Council which on the 17th March, 1869, restored the decree of the original Court. On the 9th October, 1869, the plaintiff applied for execution against all the defendants, and the decree was under execution until July

1872, B being a party to the execution proceedings. In 1874, the decree being rather vague and difficult to execute, an application for review was made, and, in 1876, the decree was amended, and, subsequently, the plaintiff applied for execution of the amended decree, when B objected that the execution was barred as against him ; but the High Court held that time would run from the date of the amended decree to which B was a party ; *Kishen v. Collector of Allahabad*, I. L. R. 4 All. 187.

*Clause 4. Where an application for execution has been made.*—Under Act IX of 1871, the *bonâ fides* of the application did not come into question ; *Kohinee v. Bhugwan*, 22 W. R. 154 ; *Eshan Chunder v. Prannath*, ib. 572 ; *Shurut v. Abdool Khyr*, 23 W. R. 327 ; and it does not under this Act ; consequently, all that has to be looked to is, whether an application has been made.

*Date of application.*—Limitation runs from the date of the application, and not from the date of the Court taking proceedings thereon ; *Faez Baksh v. Sudut Ali*, 23 W. R. 282 ; and the continuance of proceedings under a previous application until within three years of a subsequent application will not bar limitation if the two applications are more than three years apart ; *Jibhai v. Parbhu Bapu*, I. L. R. 1 Bomb. 59 ; *Fakir Muhammad v. Ghulam Husain*, I. L. R. 1 All. 580.

*Person applying.*—The previous application must have been made by the party seeking execution in the subsequent application, or by a party in the same interest, and not by a person whose interest (if he had any) under the decree was totally unconnected with that of the subsequent applicant ; *Duria v. Doolla*, 24 W. R. 10 ; *Venubai v. Collector of Nasik*, I. L. R. 7 Bomb. 552 ; but where a decree in favour of a firm has been passed in the name of an agent of the firm, and subsequent agents have kept the decree alive, a member of the firm subsequently coming in to execute will be allowed the benefit of those applications ; *Lachman v. Patni*, I. L. R. 1 All. 510. Where a decree is held by a mere *benamidar*, the proper person to apply for execution is the real decree-holder ; *Abdul Kureem v. Chukhun*, 5 C. L. R. 253 ; followed in *Denonath v. Lallit Coomar*,

*I. L. R.* 9 *Calc.* 633; *S. C.* 12 *C. L. R.* 146; and also in *Gour Sunder v. Hem Chunder*, *I. L. R.* 16 *Calc.* 355; in which *Purna v. Abhaya*, 4 *Ben. L. R. App.* 40, and *Nadir Hossein v. Pearoo*, 14 *Ben. L. R.* 425, were dissented from. These last two cases were, however, followed in *Balkishen v. Bedmati*, *I. L. R.* 20 *Calc.* 388; and the cases in *I. L. R.*, 9 *Calc.* and 16 *Calc.* distinguished on the ground, that in these two cases, the transferee had not been recognized by the Court. It should, however, be remarked that the question before the Court in these two cases was the right of the beneficial owner, and it did not decide what the effect of an application by the *benamidar* would have been. An application was made for execution of a decree by persons who alleged that they were the beneficial owners of a decree, but they then failed to satisfy the Court on that point. Within three years of this application, they made another application and were then able to prove that they were the beneficial owners of the decree: and it was held that they were entitled to have the benefit of the former application; *Abdul Kureem v. Chukhun*, 5 *C. L. R.* 253.

Where a decree for redemption does not fix the date on which the money due on a mortgage is to be paid, the mortgagor can execute the decree by paying the mortgage money, even though the decree is more than three years old, provided that it has been kept alive by applications for execution, or in any other way allowed by law; *Narayan v. Anandram*, *I. L. R.* 16 *Bomb.* 480.

*In accordance with law.*—"In accordance with law" means in accordance with the law relating to the execution of decrees; *Balkishen v. Bedmati*, *I. L. R.* 20 *Calc.* 388; and, *inter alia*, in accordance with the provisions of this clause; therefore, the applicant may be called upon to prove that his prior application was within time, *i. e.*, within three years of some preceding application, or other date fixed for the commencement of limitation; *Nilmony v. Ramjeebun*, 8 *C. L. R.* 335. If the Court to which he then applied adjudicated upon that application, and granted it, the matter is *res judicata*; *Mungul Pershad v. Grijji Kant*, 8 *I. A.* 123; *S. C.*, *I. L. R.* 8 *Calc.* 51; or if the Court has dismissed the application; *Bandey Karim v. Romesh Chunder*, *I. L. R.* 9 *Calc.* 65; but, although between the parties the matter is

*res judicata*, it is open to third parties, *e. g.*, another creditor seeking to share in the proceeds of an execution to dispute the correctness of the adjudication; *Tincowrie v. Debendro Nath*, *I. L. R.* 17 *Calc.* 491. The mere receipt of the application by the Court can scarcely be termed an adjudication, although the Court was bound to reject it if it was not within time; and if the Court has taken no steps on the application, or only issued a notice, and the judgment-creditor has done nothing further in the matter, there has been no real adjudication, and the applicant may be called upon to prove that that application was in time; see *Prabhacarrow v. Potamiah*, *I. L. R.* 2 *Mad.* 1; *Unnoda Persad v. Sheikh Koorpan*, *I. L. R.* 3 *Calc.* 518; *Hari v. Narayen*, *I. L. R.* 12 *Bomb.*, p. 430; but the reasonable construction of the words of this clause would seem to limit the enquiry to the immediately preceding application, and not, in the event of that *appearing* to have been according to law, to allow a roving examination into all the previous applications in order to ascertain whether there might not be a weak link in the chain.

Where the defect alleged was that the power of attorney under which the former applications were made was defective and did not authorize them, the Court refused to go into the matter as it was an objection which ought to have been taken when the former applications were made; *Lakmi Das v. Gobind Ram*, *Panj. Rec.* No. 105 of 1882.

“*In accordance with law*” further means an application to the Court to do something which by law the Court is competent to do, and it is inapplicable to an application to the Court to do something which to the decree-holder’s direct knowledge, or from his presumed knowledge of law, he must have known the Court was incompetent to do; *Chattar v. Newal Singh*, *I. L. R.* 12 *All.* 64.

Where an application is informal it ought to be dismissed, but if ordered to be amended, the application as amended will be considered as having been on the file of the Court on the day on which it was presented; *Fuzloor v. Altaf*, *I. L. R.* 10 *Calc.* 541. When an application was not in exact accordance with the requirements of the Civ. P. C., and was returned for amendment,



but nothing further was done upon it : it was held to have been an application *substantially* in accordance with law ; *Ramanadan v. Periatambi*, *I. L. R.* 6 *Mad.* 250 ; followed in *Rama v. Varada*, *I. L. R.* 16 *Mad.* 142 ; *Hurry Charan v. Subaydar*, *I. L. R.* 12 *Calc.* 161, following *Syud Mahomed v. Syud Abdoollal*, 12 *C. L. R.* 279 ; so, too, where a *bonâ fide* mistake was made by inserting the name of a dead judgment-debtor ; *Samia v. Chockalinga*, *I. L. R.* 17 *Mad.* 76. Where a decree-holder filed an application for execution without specifically setting out a description of the properties sought to be attached, and fourteen days afterwards obtained a month's time to file such description which he did : it was held that the date to be looked at for limitation was the date of the first application ; *Macgregor v. Tarini Churn*, *I. L. R.* 14 *Calc.* 124 ; *Baness v. Turton*, *Panj. Rec.* No 23 of 1883. The fact that an application for the execution of a decree is insufficiently stamped does not make the application illegal ; *Ramasam v. Seshayangar*, *I. L. R.* 6 *Mad.* 181. Where an application for execution was found not to be in accordance with the decree, and was withdrawn, it is not an application in accordance with law ; *Kifayat v. Ram Singh*, *I. L. R.* 7 *All.* 359 ; followed in *Sarju Prasad v. Sitaram*, *I. L. R.* 10 *All.* 71.

Where a judgment-debtor, who had obtained a decree against a minor represented by his mother, applied for and obtained execution against the mother only : it was held that that was an application according to law sufficient to prevent time running ; *Hari v. Narayan*, *I. L. R.* 12 *Bomb.* 427.

Where a decree is transferred (really or ostensibly) by an assignment in writing and the assignee makes an application for execution which is granted by the Court, such application, as between the judgment-debtor and the assignee, although he be a *benamidar*, is in accordance with law, and will keep the execution proceedings alive ; *Balkishen v. Bedmate*, *I. L. R.* 20 *Calc.* 388.

An application to the Court which passed the decree for a certificate to allow execution to be taken out in another Court is not an application for the execution of a decree ; *Nilmoney v. Biressur*, *I. L. R.* 16 *Calc.* 744, but it is a step in aid of execution, *quod vide*.

An application by the representative of a deceased decree-holder, his name not having been substituted on the record in the place of the deceased, is not an application according to law; *Gunga Pershad v. Debi Sundari*, I. L. R. 11 Calc. 227.

An application by a pleader for execution of a decree two days after the decree-holder's death is not an application according to law, as his authority ceased on the death of his client; *Kallu v. Muhammed*, I. L. R. 7 All. 564.

Where the holders of a decree applied for execution by asking the Court to order the Collector to substitute their names for that of the judgment-debtor in respect of the lands decreed to them instead of asking the Court to send a copy of the decree to the Collector for his information, in order that he might make the necessary change of names, the Civil Courts being prohibited from issuing orders to Revenue Courts: it was held that the application was not according to law; *Muhammad v. Kamilla*, I. L. R. 4 All. 84.

An application for execution properly made does not cease to be an application in accordance with law, because it is made with the object of keeping the decree alive, and not in the expectation that any effectual steps can be taken against the judgment-debtor; *Baness v. Turton*, Panj. Rec. No. 23 of 1883; *Secus*, where the application itself is not one for execution of the decree; *Kallu Mal v. Alaf Khan*, *ib.*, No. 41 of 1884.

An application to a Court for the execution of a decree against a Dekhan agriculturist is not in accordance with law unless accompanied by the certificate of a conciliator under Act XVII of 1879; *Manohar v. Gebiapa*, I. L. R. 6 Bomb. 31.

*Execution. Step in aid.*—The application must be for execution, or for the Court to take some step in aid of execution, or in furtherance of the execution of the decree; *Umesh Chunder v. Soonder Narain*, I. L. R. 16 Calc. 747. It must be an application setting the Court in motion to execute a decree in the manner set out in the last column of the form prescribed by Sect. 235, C. P. C., but having so set the Court in motion any further application during the continuance of the same proceeding is an application to take some step in aid of execution; *Chowdhry*

*Paroosh v. Kali Puddo*, I. L. R. 17 Calc. 53; approved of in *Dalichand v. Bai Shivkor*, P. J. 1890, p. 260. It is not sufficient that it should be an application merely to keep the decree alive, as was the case in *Chunder Coomar v. Bhogobutty*, I. L. R. 3 Calc. 235; see *Gurupadapa v. Virbhadrappa*, I. L. R. 7 Bomb. 459. It would also seem that where an application is made relating to the execution of the decree, but the applicant does not state what step he wishes to be taken, as was the case in *Behari v. Salik*, I. L. R. 1 All. 675, that application will not come under this clause. The case of *Jumnadas v. Lalitram*, I. L. R. 2 Bomb. 294, differs from the foregoing Calcutta and Allahabad cases in that, in the application the execution-creditor asked the Court to order the Collector to continue making a payment which he had discontinued. These three cases were decided under Act IX of 1871.

An order of Court is not a step in aid of execution unless it is made on the application of the judgment-creditor; *Motendro v. Mohendro*, 10 C. L. R. 330; *Rajkumar v. Rajlaxhi*, I. L. R. 12 Calc. 441; an application is absolutely necessary, as it is from the date of applying that limitation runs.

In deciding whether any particular act is or is not an application for, or a step in aid of, execution, it is the nature of the act which must be looked to, and not the time at which it may be possible to do it; *Koormayya v. Krishnamma*, I. L. R. 17 Mad. 165.

The following have been held to be applications for the Court to take a step in aid of execution:—

An application to the Court passing the decree to send it to another Court for execution; *Collins v. Maula Baksh*, I. L. R. 2 All. 284; *Latchman v. Muddon*, I. L. R. 6 Calc. 513; *Rajbulubh v. Joy Kishen*, I. L. R. 20 Calc. 29; but not if the application be to send it to the Court of a foreign State; *Nawab Saadat v. Nawab Muhammad*, Panj. Rec. No. 107 of 1881; an application to return the decree to the Court which passed it; *Krishnayyar v. Venkayyar*, I. L. R., 6 Mad. 81; an application made after an order for transmission, bringing in postage-stamps, and asking that the decree

might thereupon be transmitted ; *Vellaya v. Jaganatha*, *I. L. R. 7 Mad.* 307.

An application by a judgment-creditor to take out of Court money realized by a sale in execution of a decree ; *Venkatara-yalu v. Narasimha*, *I. L. R. 2 Mad.* 174 ; *Paran v. Jawahir*, *I. L. R. 6 All.* 366 ; dissented from in *Fuzul Imam v. Metta*, *I. L. R. 10 Calc.* 549, *post*, p. 378, but followed in *Gunga Pershad v. Debi Sundari*, *I. L. R. 11 Calc.* 227 ; and *Kerala Varma v. Shangaram*, *I. L. R. 16 Mad.* 452. *Secus*, *Mulchand v. Kour Singh*, *Panj. Rec.* No. 27 of 1888.

An application by a judgment-debtor to have an execution case struck off the file on the ground that he had made certain arrangements with the decree-holder ; *Ghansham v. Mukha*, *I. L. R. 3 All.* 320 ; *Sitha Din v. Sheo Prasad*, *I. L. R. 4 All.* 60 ; *Rajulkhy v. Rash Munjury*, *I. L. R. 5 Calc.* 515. This application would, also, have probably amounted to an acknowledgment under Sect. 19. For the case of a similar application by a judgment-creditor, see *post*, p. 379. See, also, *Koormayya v. Krishnamma*, *I. L. R. 17 Mad.* 165.

An application in accordance with law which is dismissed ; *Shankar Bisto v. Narsinghrav*, *I. L. R. 11 Bomb.* 467.

An application by a judgment-debtor to have the sale of certain attached lands postponed, the decree-holder consenting thereto on the condition that certain other lands were sold forthwith ; *Dharanamma v. Subba*, *I. L. R. 7 Mad.* 306.

An application by an assignee under a deed, possibly requiring registration in order to prove his title, which was not registered at the time of the application, but which was subsequently registered ; *Abdul Majid v. Muhammad*, *I. L. R. 13 All.* 89.

An application by the judgment-creditor to bring execution proceedings on the file, in order that a payment of money by the judgment-debtor might be recorded ; *Tarini v. Bishtoo Lall*, *I. L. R. 12 Calc.* 608 ; followed in *Muhammad Husain v. Ram Sarup*, *I. L. R. 9 All.* 9 ; so also where such an application is made by one of the judgment-debtors ; *Wasi Imam v. Poonit Singh*, *I. L. R. 20 Calc.* 696.

An application to record satisfaction in respect of part-payment of a decree; *Sujan Singh v. Hira Singh*, *I. L. R.* 12 *All.* 399 (*F. B.*).

An application by a judgment-creditor to enable him to obtain a copy of the Revenue Register from the Collector in order to describe the land in an application for execution, when the Collector will not give such copy without an order of Court; *Kunhi v. Seshagiri*, *I. L. R.* 5 *Mad.* 141.

An application to execute an attached decree; *Lachman v. Thondi*, *I. L. R.* 7 *All.* 382.

An application for execution which was subsequently withdrawn, with leave to renew it, the property still remaining under attachment; *Ram Narain v. Bakhtu*, *I. L. R.* 16 *All.* 75.

An application to attach property even when presented apart from the application for execution; *Lakmi Das v. Gobind Ram, Panj. Rec.* No. 105 of 1882.

An application to issue a proclamation of sale; *Ambica v. Surdhari*, *I. L. R.* 10 *Calc.* 851; *Chowdhry Paroosh v. Kali Paddoo*, *I. L. R.* 17 *Calc.* 53; even though it be a verbal application only; *Maneklal v. Nasia*, *I. L. R.* 15 *Bomb.* 405.

The deposit of *nilami* fees for bringing property to sale; *Radha Prosad v. Sunderi Lall*, *I. L. R.* 9 *Calc.* 644; and the payment of *bhatta* for the sale-warrant; *Bhoma v. Kamaji*, *P. J.* 1884, p. 311; but not the mere payment of a fee by the judgment-creditor in order to obtain leave to bid; *Toree Mahommed v. Mahommed Mabud*, *I. L. R.* 9 *Calc.* 730; if, however, the execution creditor makes an application for leave to bid, that is a step in aid of execution; *Bansi v. Sikri Mal*, *I. L. R.* 13 *All.* 211.

An application by a decree-holder that an objection by the judgment-debtor to the sale might be disallowed and the sale proceeded with; *Kewal Ram v. Khadun*, *I. L. R.* 5 *All.* 576; followed in *Gobind Pershad v. Rung Lal*, *I. L. R.* 21 *Calc.* 23; an application by a judgment-creditor to have his witnesses examined on an objection raised to the attachment or sale of property; *Ali Muhammad v. Gur Prasad*, *ib.* 344.

Where a judgment-creditor attached property to which a claim was thereupon made by a mortgagee, and the claim subsequently admitted by the judgment-creditor, an application by him to have the property sold subject to the mortgagee's claim is a step in aid of execution; *Lalraddi v. Kala Chand*, I. L. R. 15 Calc. 363.

Where a decree has been transferred to the Collector for execution, and he attaches property and receives year by year certain sums of money, which on the application of the judgment-creditor are paid to him from time to time; such applications for payment are steps in aid of execution; *Keshavlal v. Pitamber*, P. J. 1894, p. 64.

Where a decree is passed against one defendant only in respect of a portion of the relief claimed in the suit, and against the defendant and others in respect of another portion of the relief, an application against all those defendants to execute the decree against them, after an application to execute the whole decree, is a step in aid of execution and will keep the whole decree alive so as to be available against the single defendant when execution is sought of that portion of the decree made against him only, more than three years after the date of the decree; *Kalidas v. Varjivan*, I. L. R. 15 Bomb. 245.

An application for execution which is not in accordance with the provisions of Sect. 235, C. P. C., is not a step in aid of execution, but if the judgment-debtor does not object to such an application, but allows an order to be passed on it, he cannot on a subsequent application object to the former application as not being according to law, so as to prevent its being used to avoid the effect of limitation; *Dalichand v. Bai Shivkor*, I. L. R. 15 Bomb. 242.

An application by the representatives of a deceased decree-holder will keep the decree alive, although they may not then have obtained a certificate under the Succession Certificate Act, in consequence whereof the application is dismissed; *Hafizuddin v. Abdool Aziz*, I. L. R. 20 Calc. 755; *Sobba Singh v. Tatta*, Panj. Rec. No. 54 of 1893; *Mangul Khan v. Salimullah*, I. L. R.

16 *All.* 26 ; following *Brojo Nath v. Isswar Chundra*, *I. L. R.* 19 *Calc.* 482.

The following have been held to be applications to enforce a decree under Act IX of 1871, and would be applications to take a step in aid of the execution of the decree under this Article:—

An application by the son of a judgment-creditor to have his name substituted for that of his father in the proceedings and that the defendant might be ordered to pay him the amount of the decree; *Govind Shanbhog v. Appaya*, *I. L. R.* 5 *Bomb.* 246 ; *Keshavlal v. Pitamber*, *P. J.* 1894, p. 64.

An oral application, after the postponement of a sale, to have a new day fixed for the sale; *Amal Singh v. Tika*, *I. L. R.* 3 *All.* 139.

An informal application in the nature of a petition that orders made on a previous application might be carried out in a particular way, was held under Act IX of 1871, not to be an application to enforce the decree; *Jibhai v. Parbhu Bapu*, *I. L. R.* 1 *Bomb.* 59 ; following *Gouree Shunker v. Arman*, 21 *W. R.* 309 ; but it would be now an application for a step in aid to be taken.

The following have been held *not* to be applications for a step in aid of execution to be taken:—

An application to bring a decree into conformity with the judgment is not an application for a step in aid of execution, and does not form the starting point of a new period of limitation ; *Kallu Rai v. Fakiman*, *I. L. R.* 13 *All.* 124.

An application by the decree-holder to take out of Court money deposited in the suit by the defendant; *Hem Chunder v. Brojo Soondury*, *I. L. R.* 8 *Calc.* 89 ; followed in *Fuzul Imam v. Metta*, *I. L. R.* 10 *Calc.* 549 ; *Nawab Saadat v. Nawab Muhammad*, *Panj. Rec.* No. 107 of 1881 ; *Mulchand v. Koursingh*, *Panj. Rec.* No. 27 of 1888 ; but see *Paran v. Jawahir*, *ante*, p. 375, and *Koormayya v. Krishnamma*, *I. L. R.* 17 *Mad.* 165.

An application for execution which is withdrawn ; *Pirjade v. Pirjade*, *I. L. R.* 6 *Bomb.* 681 ; dissented from in *Tara-*

*chand v. Kashinath*, I. L. R. 10 Bomb. 62; following *Eshan Chunder v. Prannath Nag*, 22 W. R. 512. *Tarachand v. Kashinath* was dissented from and *Pirjade v. Pirjade* followed in *Sarju Prasad v. Sita Ram*, I. L. R. 10 All. 71; see, also, *Kifayat v. Ram Singh*, I. L. R. 7 All. 359. The withdrawal of the application need not be with the sanction of the Court; *Wajiban v. Bishwanath*, I. L. R. 18 Calc. 469; and the cases cited therein; followed in *Radha Kishen v. Radha Pershad*, I. L. R. 18 Calc. 515.

An application which is not in accordance with the decree; *Kifayat v. Ram Singh*, I. L. R. 7 All. 359; or which asks for execution in a way different from that provided by the decree; *Pandarínath v. Lilachand*, I. L. R. 13 Bomb. 237.

An application by a judgment-creditor to have a sale postponed on the ground that he had given time to the judgment-debtor; *Mainath v. Debi Buksh*, I. L. R. 3 All. 757; following *Fakir Muhammad v. Ghulam Husein*, I. L. R. 1 All. 580.

An application to release a portion of attached property from attachment but to continue it on the remainder; *Abdul v. Fazilun*, I. L. R. 20 Calc. 255.

An application asking the Court to ascertain how much the judgment-creditor has been overpaid; *Muthoorá v. Shumbhoo*, 22 W. R. 211.

An application that a copy of the decree filed in Court might be returned in order that it might be attached to a fresh application for execution, no copy of the decree being required to be filed on such fresh application; *Rajkumar v. Rajlakhí*, I. L. R. 12 Calc. 441.

An application for a copy of the decree in order to found thereon an application for execution, the decree itself being in Court; *Gopilandhu v. Domburu*, I. L. R. 11 Mad. 336.

An application for leave to bid at an auction sale of attached property; *Muhammad Shaffre v. Bulri Mal*, Panj. Rec. No. 83 of 1884; but see p. 376.



An application by the judgment-creditor in the course of the proceedings to have the date fixed for the hearing communicated to him; *Khushala v. Gamin*, *Panj. Rec.* No. 29 of 1835.

The appearance of a decree-holder by his pleader to oppose an application by the judgment-debtor to set aside a sale in execution is not an application within this Article; *Umesh Chunder v. Soonder Narain*, *I. L. R.* 16 *Calc.* 747.

The filing of objections by the plaintiff to an application by one defendant for the execution of the decree obtained by him against the plaintiff is not a step in aid of the execution of his decree against the other defendants; *Shib Lal v. Radha Kishen*, *I. L. R.* 7 *All.* 898. (This appears to be the effect of the judgment in this case, but the facts are stated in such an imperfect manner that it is impossible to ascertain with certainty the real effect of the judgment.)

A suit to establish the right to attach a portion of property which has been released from attachment is not a step in aid of execution against the portion which was not released from attachment; *Rughoonundun v. Bhugoo Lal*, *I. L. R.* 17 *Calc.* 268.

Where a judgment-debtor appealed against an order made in execution of a decree, and the appeal was dismissed, but the judgment-creditor allowed the execution proceedings to drop, the judgment-creditor cannot treat his opposition to the appeal of the judgment-debtor as an application to the proper Court to take some step in aid of execution, so as to relieve him from the necessity of making his next application within three years of his former one; *Kristo Coomar v. Mahabat*, *I. L. R.* 5 *Calc.* 595.

It has been held in England that writing a letter to the opposite party asking for time to put in a statement of defence is not a step in the action; *Chappell v. North*, [1891] 2 *Q. B.* 252; *Brighton Marine Palace and Pier v. Woodhouse*, [1893] 2 *Ch.* 486; and that an application to the other side to take a step in the proceedings is not a step on the

proceedings, but that there must be something in the nature of an application to the Court; *Ives v. Willans*, [1894] 2 Ch. 478.

*Clause 5. Where notice has been issued.*—Where a notice has been issued within three years after an application; and within three years after the notice, but more than three years after the application, another application is made, this latter application is within time; *Shurut Chunder v. Abdool Khyr*, 23 W. R. 327; whether the notice has been issued on a valid or invalid application for execution; *Dhonkal v. Phakkul*, I. L. R. 15 All. 84 (F. B.).

*Clause 6. Payment directed at certain dates.*—A judgment-creditor agreeing to take the amount of a decree by instalments will not bring the case, under this clause, nor in any way extend the time for executing it; *Kristo Komul v. Huree Sirdar*, 13 W. R. F. B. 44; *Sitla Din v. Sheo Prasad*, I. L. R. 4 All. 60; *Bal Chand v. Ragunath*, *ib.* 155; *Bassawa Mal v. Sirdar Amar*, Panj. Rec. No. 190 of 1882; but where an order is made under Sect. 210 of the Civ. P. C., the time is extended; *Tata v. Konadala*, I. L. R. 7 Mad. 152; *Gandharap v. Sheodharshan*, I. L. R. 12 All. 571; unless the order of the Court allowing payment by instalments was made after the expiry of the time fixed by Art. 175 for an application by a judgment-debtor to be allowed to pay by instalments; *Abdul Rahaman v. Dullaram*, I. L. R. 14 Calc. 348; but where both parties agree to such an order, it is not open to either of them to say it is a bad order; *Man Mohun v. Durga Churn*, I. L. R. 15 Calc., p. 504. The Court competent to make such an order is the Court which passed the decree, not the Court executing it; *Gandharap v. Sheodharshan*, I. L. R. 12 All. 571. A sanction under Sect. 257A, C. P. C., does not operate as an order under Sect. 210; *ib.*

Where the judgment-creditor and the judgment-debtor agree to payments by instalments, and the Court merely orders the agreement to be filed without passing any order upon it, that does not amount to a decree directing payment at certain dates; *Chajju v. Gulab*, Panj. Rec. No. 61 of 1856.

Where a decree has been made payable by instalments, with a proviso that if any one instalment be not paid on the date assigned for its payment, the whole decree shall become payable at once; execution must be sought within three years from the date on which the first unpaid instalment became due, and the acceptance by the creditor of subsequent instalments will not extend the time; *Dulsook v. Chugon*, I. L. R. 2 Bomb. 356; see, also, *Shib Dat v. Kalka Prasad*, I. L. R. 2 All. 443; *Ugrah Nath v. Lagarmani*, I. L. R. 4 All. 83; and *Zaheer Khan v. Bakhtawur*, I. L. R. 7 All. 327; *Mon Mohun v. Durga Churn*, I. L. R. 15 Calc. 502; nor has the judgment-creditor the option of waiving the default; *Hurri Pershad v. Nasib Singh*, I. L. R. 21 Calc. 542; dissenting from *Chandra Kamal v. Bissessouree*, 13 C. L. R. 243. But where the decree only gives the decree-holder the right or option to execute the whole decree on the failure of one or more instalments, his omission to apply for execution within three years of the non-payment of such instalment will only affect his right to recover that instalment, and to recover the whole of the decree at once, but will not affect his right to recover subsequent instalments; *Asmutulla v. Kally Churn*, I. L. R. 7 Calc. 56; *Radha Prasad v. Bhugwan*, I. L. R. 5 All. 289; *Nilmadhub v. Ramsodoy*, I. L. R. 9 Calc. 857; but if more than three years from the date of the last payment of an instalment be applied to execute the whole decree, his application will be barred; *Bir Narain v. Durpa Narain*, I. L. R. 20 Calc. 74.

The High Court at Calcutta (*Petheram*, C. J., and *Cunningham*, J.), apparently without considering any of the cases, except *Nilmadhub v. Ramsodoy*, have broken in upon this current of decisions, including one of their own Court, and held that where a decree is payable by instalments with a proviso that on non-payment of one instalment the whole shall become payable, and default is made, the creditor may waive the default, and go on recovering the instalments, and may issue execution for a particular instalment more than three years after the whole amount under the decree has become payable; *Ram Culpoo v. Ram Chunder*, I. L. R. 14 Calc. 352; and this decision has been followed in the case of *Mon Mohun v. Durga Churn*, *ubi supra*, where, however, the expression of

opinion on this point was only an *obiter dictum*, and not necessary to the decision of the case; and further the difference between the whole amount of the decree *being made payable* on default; and an *option being given* to the judgment-creditor to enforce the whole decree was not considered. It is to be remarked that in clause 6, there is nothing about waiver as in Art. 75, and the sole question is whether by the terms of the decree the whole amount the decree becomes payable on default, or whether only an option is given to the creditor to enforce the whole amount if he so chooses.

The High Court at Madras has held that, when a decree provides that, on failure in payment of an instalment, the whole unpaid portion of the decree shall be recoverable, the creditor need not issue execution for the whole amount, but may go on recovering the instalments; *Appaya v. Pappaya*, *I. L. R. 3 Mad.* 256. It does not clearly appear from the report of this case, whether the decree made the whole amount payable on default in an instalment, or whether it only gave the creditor the option of enforcing the whole amount, but it would rather seem as if the latter was the case.

Where a decree was passed for possession of immoveable property which was not to be executed so long as the defendants made certain annual payments to the plaintiff, but provided that in default of payment of any one year's allowance the plaintiff should be entitled to delivery of possession; it was held that the case fell under Art. 178, and that the plaintiff was not bound to execute on the first default but could execute within three years of any one default; *Muhammad Islam v. Muhammad Ahsan*, *I. L. R. 16 All.* 237.

In connection with the foregoing cases on decrees payable by instalments, the following case from England though on a different point may be useful. Where money lent was made payable at a certain time, subject to the payment of interest quarterly, but it was provided that, if any quarterly payment of interest should remain unpaid twenty-one days after the same should become payable, *it should be lawful* for the plaintiff immediately upon the expiration of such twenty-one days to call in and

demand payment of the principal sum and all interest then due, it was held that the cause of action accrued on the expiration of twenty-one days from the time when the first unpaid instalment of interest became due, although the plaintiff had never called in or demanded the money; *Reeves v. Butcher*, [1891] 21 Q. B. 509; following *Hemp. v. Garland*, 4 Q. B. 519.

A decree provided that the amounts should be payable by instalments, and on failure in the payment of any two the whole amount should become payable. The decree-holder applied for execution in respect of the third and fourth instalments, and the defendant alleged that default had been made in payment of the first two instalments, and that the present application was barred. The decree-holder was allowed to prove payment of the first two instalments otherwise than through the Court, although the payment had not been certified; *Sham Lal v. Kanania*, I. L. R. 4 All. 136; following *Fakir Chand v. Madan Mohun*, 4 Ben. L. R. 130; *Zahurkhan v. Bak'awur*, I. L. R. 7 All. 327. Tyrrell, J., has, however, refused to follow these cases in *Mitthu v. Khairati*, I. L. R. 12 All. 569, on the ground that the two former decisions were passed before Sect. 258, C. P. C., 1882, came into force, and that in the third case no notice was taken of the change of law introduced by that section, and held that the decree-holder could not now be allowed to prove payment of any instalment which had not been certified through the Court.

The High Court at Madras has held that where a decree provides that a certain sum shall be paid "annually" or "monthly," it is not a decree for money to be paid at a certain date, and limitation will run from the date of the decree. In order to bring a case within this clause, a definite date in each month or year should be inserted in the decree for the payment of each instalment; *Sabhanatha v. Lakshmi*, I. L. R. 7 Mad. 80; *Yusuf v. Sirdarkhan*, ib. 83. But the High Court at Bombay has held that such a decree means that the amounts decreed were to be paid monthly or yearly from the date of the decree, i. e., on the date in each month or year corresponding to the date of the decree; *Lakshmidai v. Madharav*, I. L. R. 12 Bomb. 65; and this is certainly the more logical decision of the two. This case

was followed in *Spiers v. Shaikh Sadodin*, P. J. 1889, p. 32. The High Court at Calcutta has also held that a decree ordering the payment of future maintenance at a certain rate per month is a decree payable by instalments, and that the future amount of maintenance can be recovered by execution in the suit; *Ashutosh v. Lukhimonji*, I. L. R. 19 Calc. 139 (F. B.).

The High Court at Madras has, however, since held that where it may be gathered from the decree as a whole that payment is directed to be made on dates or at periods which are sufficiently indicated by the terms of the decree, the requirements of this clause are satisfied; *Kaveri v. Venkamma*, I. L. R. 14 Mad. 396.

Where, however, there is no direction to pay future maintenance, but only a declaration that the plaintiff is entitled to maintenance at a certain rate, that is not a decree payable by instalments which can be executed; *Ram Dial v. Indar Kuar*, I. L. R. 16 All. 179, following *Vishnu v. Majamma*, I. L. R. 9 Bomb. 108.

Where a decree provided that, if a certain sum of money was not paid within four months, the decree might be executed by the sale of certain property mortgaged to secure the money advanced: it was held that the case fell under Art. 178, and not under this Article; *Thakur Das v. Shadi Lal*, I. L. R. 8 All. 56; but it is difficult to see why it should not have been held to have fallen under this clause. Where a decree directed a plaintiff to do a certain act at a certain time, and that, on his doing so, the defendant should do a certain other act, limitation will run from the time fixed in the decree for the doing of the act by the plaintiff; *Narayan v. Vithul*, I. L. R. 12 Bomb. 23; followed in *Pandarinath v. Lilachand*, I. L. R. 13 Bomb. 237. These two cases were dissented from in *Jalla v. Doola*, Panj. Rec. No. 126 of 1892, following a previous full Bench decision.

Where a decree was made for redemption within a certain fixed time, but nothing was said as to what was to be done if the property was not then redeemed, it was held that the decree could be executed at any time within three years from the fixed time; *Bandhu v. Shah Muhammad*, I. L. R. 14 All. 350.

*Explanation I.*—Where a certain sum in a decree was first adjudged to five persons jointly as an entire sum and then half of it was adjudged to three of those persons, and half to the other two: it was held that the effect of the decree was the same as if there were two separate and distinct decrees in favour of the three persons and the two respectively; *Chooa Sahoo v. Tripoorra*, 13 W. R. 244.

*Joint decrees.*—So long as one part of an indivisible decree is being executed the whole is kept alive so far as limitation is concerned, *Doya Moyee v. Nilmoney*, 25 W. R. 70. Where a Court allowed some out of a number of joint decree-holders to execute a certain proportion of the decree for their own benefit: it was held that such proceedings would operate for the benefit of all in respect of limitation; *Shib Chunder v. Ram Chunder*, 16 W. R. 29; *Ponampilath v. Bavotti*, I. L. R. 3 Mad. 79; and in the converse case of a decree-holder executing a proportionate part of a decree for costs against some of the joint defendants: it was held that these proceedings kept the decree alive against all; *Sheikh Buneed v. Jugessur*, 6 W. R. Misc. 25. The High Court at Allahabad, however, in a similar case, held that an application by some of the decree-holders would not keep the decree alive in favour of the others; *Ram Autar v. Ajudhia*, I. L. R. 1 All. 231; followed in *Collector of Shahjahanpur v. Surjun*, I. L. R. 4 All. 72; but in a subsequent case it was held that, although the prior application was not, in form, strictly correct, yet as no objection had been made at the time, and the Judge had allowed it, it must be held to have been a good application, and available for the purpose of subsequent applications; *Nanda v. Raghunandan*, I. L. R. 7 All. 282. It has, however, been several times held that a Court cannot allow one of two joint decree-holders to take out execution of a part of it to the extent only of his own interest; *Haro Sunker v. Tarak Chandra*, 3 Ben. L. R. A. C. 114; and the cases cited at p. 118 of that report; *Seetaput Roy v. Syud Ali*, 24 W. R. 11; *Banarsi Das v. Maharani Kuar*, I. L. R. 5 All. 27; see, also, *Kishore Chand v. Gisborne*, I. L. R. 17 Calc. 541. Consequently, it would seem that an application by one decree-holder to take out execution to the extent of his own share only

would not be an application according to law, and would not keep the whole decree alive. An application by some of a number of joint judgment-debtors concurred in by the judgment-creditor, keeps the decree alive in favour of the judgment-creditor; *Wasi Imam v. Poonit Singh*, *I. L. R.* 20 *Calc.* 696.

A father obtained a decree declaring him entitled to a share of certain property on partition, but never executed it. Subsequently, his son obtained a decree declaring him entitled to a certain share of what the father should obtain under the former decree, and applied to execute his father's decree, giving notice to his father who refused to join in the application. Subsequently, when execution would otherwise have been barred, the father applied to execute his decree; and it was held that although the effect of the son's decree was not to make him and his father joint decree-holders in respect of the father's decree, the son was a transferee of part of his father's decree, and entitled to make the application he had made, which was consequently an application in accordance with law and kept the decree alive; *Ramasami v. Anda Pillai*, *I. L. R.* 14 *Mad.* 252; reviewing *Ramasami v. Anda Pillai*, *I. L. R.* 13 *Mad.* 347.

An application for execution of a decree against one of several legal representatives of a deceased judgment-debtor takes effect, for the purpose of limitation, against them all; *Ram Anuj v. Hingu Lal*, *I. L. R.* 3 *All.* 517; followed in *Krishnaji v. Murarav*, *I. L. R.* 12 *Bomb.* 48.

A decree for partition is a decree in favour of both the plaintiff and the defendant; consequently, an application by the plaintiff to execute it will keep it alive in favour of a subsequent application by the defendant for its execution; *Sheikh Koorshed v. Nubbee*, *I. L. R.* 3 *Calc.* 551; *Mohun v. Mohesh*, *I. L. R.* 9 *Calc.* 568; *Narayan v. Vithal*, *P. J.* 1886, p. 287.

*Explanation II.*—A Court to which an appeal has been preferred is not the proper Court to execute the decree appealed against within the meaning of this explanation; *Kristo Coomar v. Mahabat*, *I. L. R.* 5 *Calc.* 595.

Where a decree has been sent to the Court of another district, and a return has been made by that Court to the Court which



passed the decree that it had been partially executed, an application subsequently made to the executing Court, but without any further certificate from the other Court, is an application made to the proper Court; *Harbhaj v. Mukund*, *Panj. Rec.* No. 168 of 1888.

A conciliator under the Dekhan Agriculturists' Act is not the proper Court to execute a decree; *Mahadaji v. Shivaji*, *P. J.* 1881, p. 243. Time spent in making an application to a conciliator before applying to a Civil Court for execution is provided for by the Dekhan Agriculturists' Act, 1879, Sect. 48, as amended by Act XXIII of 1881, Sect. 10.

**Art. 180.** *To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction, or an order of Her Majesty in Council; twelve years from the date when a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right: provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby, or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing, signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment, or the latest of such revivors, payments or acknowledgments, as the case may be.*

### Notes.

This Article is the same as Art. 169 of Act IX of 1871, with the exception that it now includes Orders of her Majesty in Council.

The rule of limitation for the execution of a decree depends upon the Court which passes it, and not upon the Court which executes it; *Tincourie v. Debendro Nath*, *I. L. R.* 17 *Calc.* 491.

This Article only applies to Orders of Her Majesty in Council, and decrees passed by a High Court in the exercise of its *ordinary original* Civil jurisdiction; all other decrees of the High Courts will come under Art. 179; see *ante*, p. 363. *Ordinary jurisdiction* embraces all jurisdiction which is exercised in the ordinary

course of law, without any special step or order being necessary to assume it; *Navivahoo v. Turner*; 16 I. A. p. 162; S. C., I. L. R. 13 Bomb. 520. Where judgment is entered up in the High Court under the provisions of the Insolvent Debtors' Act, for the amount of an insolvent's indebtedness, and, subsequently, the Commissioner makes an order for the issue of execution on such judgment, an application for execution of such judgment falls under this Article, as the judgment was entered up in the exercise of the ordinary original civil jurisdiction of the Court, but no present right to execute accrued until the Commissioner had made an order allowing execution under the judgment; *Navivahoo v. Turner*, 16 I. A. 156; affirming the order of the High Court in *Turner v. Purshotumdas*, I. L. R. 11 Bomb. 138, on the grounds set out in the judgment therein of *West, J.*

This Article is not controlled by Sect. 230 of the Civ. P. C.; *Mayabhai v. Tribhowandas*, I. L. R. 6 Bomb. 258; followed in *Ganapathi v. Balasundara*, I. L. R. 7 Mad. 540; and *Futteh Narain v. Chandrabati*, I. L. R. 20 Calc. 551.

No provision is made in this Article as to the time when part payments or acknowledgments must be made, and so the question arises whether Sects. 19 and 20 do not apply, and the part payments or acknowledgments must be made before the time of limitation has expired; *Permanandas v. Vullubdas*, I. L. R. 11 Bomb., p. 513. There was no necessity to decide the point in this case, but looking to Sect. 4, there would seem to be no doubt that Arts. 19 and 20 apply to all part-payments and acknowledgments from which new periods of limitation have their inception.

An order for execution under the Civ. P. C., made after notice to the defendant to shew cause why the decree should not be executed, has, on the Original Side of the High Courts, the same effect as an award of execution in pursuance of a writ of *sci. fa.* had under the procedure of the Supreme Court, i. e., it revives the decree; *Ashootosh v. Doorga Churn*, I. L. R. 6 Calc. 504; followed in *Ganapathi v. Balasundra*, I. L. R. 7 Mad. 540; doubted in *Tincowrie v. Debendro Nath*, I. L. R. 17 Calc. 497; but followed in *Futteh Narain v. Ohundrabati*, I. L. R. 20 Calc. 551.

Although an order of Her Majesty in Council may simply confirm a decree of the Court below, that order is the paramount decision in the suit, and any application for execution must be to execute the order, and not the decree which it confirmed, and will fall under the provisions of this Article; *Luchmun v. Kishun*, I. L. R. 8 Calc. 218 (F. B.); S. C. 10 C. L. R. 425; followed in *Bhooboona v. Jobraj*, 11 C. L. R. 277; and *Futtsh Narain v. Ohundrabati*, I. L. R. 20 Calc. 551; see, also, *Kistokinher v. Burrodacaunt*, 10 Ben. L. R. p. 114 (P. C.).

By two decrees in 1864, A was entitled to two-thirds and B to one-third of certain immoveable property with mesne profits in proportion, and each obtained possession of the property decreed to him. B appealed to the Privy Council in respect of the two-thirds awarded to A. A appealed for an account of the mesne profits due to him after deducting the mesne profits due to B, but this application was struck off as A did not give security in case B's appeal was allowed. B also applied for an account of the one-third (which was subsequently found to be Rs. 18,000), and prayed that the amount might be set-off against A's claim, but this application was subsequently stayed on A's application. In 1873 B's appeal was dismissed by the Privy Council, and within twelve years A applied for Rs. 50,000 as the amount of mesne profits due to him; at the same time B applied that the Rs. 18,000 might be set-off against what was found to be due to A: held that until the amount due to A had been rightly ascertained, B's right to maintain his set-off did not arise, and that a claim to a set-off was not barred by limitation; *Matadin v. Ohandi Din*, I. L. R. 10 All. 188.

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